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OF CASES

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AND IN THE

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COMMENCING

MICHAELMAS TERM, 1859.

BY

RICHARD SEARLE, ESQ.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW,

AND

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(*a*) See Body *v.* Body, 28 L. J. P. & M. p. 16.

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(BEFORE CRESSWELL, J. O.)

SMITH *v.* SMITH and LIDDARD.

Dissolution of Marriage—Adultery—General Averment in Petition.

A petitioner for a dissolution of marriage alleged that he was a surgeon, that the co-respondent had lived in the same house with him as his assistant for two years, and that the adultery was committed "on divers occasions" during that period. An application was made on the part of the respondent for an order to amend the petition by the insertion of further particulars. The Court held that sufficient information was given by the petitioner to enable her to meet the case to be set up against her, and the order was refused (*a*).

Thomas Browning Smith prayed for a dissolution of his marriage with Caroline Eliza Smith, on the ground of her adultery with William Liddard. The petitioner was a surgeon, and he alleged in the third paragraph of the petition that "during the two years preceding the month of May, 1859, the said William Liddard resided in the house of your petitioner, and on divers occasions during such period committed adultery with the said Caroline Eliza Smith."

(*a*) See Body *v.* Body, 28 L. J. P. & M. p. 16.

DIVORCE AND MATRIMONIAL. Nov. 3, 1859.

SMITH *v.* SMITH and LIDDARD.

Dr. Spinks, for the respondent, moved for an order to amend the third paragraph by the insertion of further particulars as to the acts of adultery. The charge was too vague to enable the respondent to meet it. This was not like a case in which the respondent and the co-respondent were cohabiting during the period named, and in which a general averment would be sufficient; they were living under the same roof, but the husband was cohabiting with the wife, and the co-respondent was living in the house as the assistant of the husband in his profession.

G. Denman, for the petitioner, opposed the motion. It would be impossible for him to give the precise dates of the acts of adultery, as he might rely upon evidence of familiarities leading to the conclusion that adultery had been committed; and even if certain dates were alleged, he would not be bound to confine his evidence to those dates.

CRESSWELL, J.O.: By ordering further particulars I should impede rather than aid the ends of justice. Where a petitioner charges his wife with adultery, committed with a person who has resided in the same house with them for more than two years, any professional man will know the sort of case she must prepare to meet;—a case of familiarities observed by servants, such as kissing the alleged adulterer and sitting on his knees, and allowing him to take liberties with her of that sort that they can only tend to one conclusion. That is the kind of case she must expect to be set up against her, and it is in vain for her to ask for further particulars.

Dr. Spinks: Your Lordship will allow the respondent a week's further time to answer?

CRESSWELL, J.O.: Certainly.

Order to amend the petition refused.

(BEFORE SIR CRESSWELL CRESSWELL.)

CROOKENDEN *v.* FULLER.

Probate—Will under a Power—Domicil for Succession—Domicil of Origin—French Law.

A will made in execution of a power is not an exception to the general rule, which requires wills to be duly executed in conformity with the law of domicil.

A man can have only one domicil for the purpose of succession. The domicil of origin is to prevail until he has not only acquired another, but has manifested and carried into effect an intention of abandoning his former domicil and taking another as his sole domicil.

The burden of proof is on the party alleging the abandonment of the domicil of origin.

Conversations and declarations, unless accompanying acts, are the lowest species of evidence of a change of domicil; but they must not be discarded in weighing the evidence.

According to the evidence given with respect to the law of France, a will made by a person domiciled in France, during a temporary visit to a foreign country, in conformity with the law of that foreign country, is valid in France.

The defendant, Francis Fuller, was the brother of the late Mary Ann Crookenden, widow, and he had obtained probate of her will in common form as one of the executors.

The plaintiff, who was the only son of the testatrix, cited the executors, Francis Fuller and William Chamier (since deceased), to bring in probate in order that the will might be declared void. The executors thereupon brought in probate, and propounded the will. They declared that Mary Ann Crookenden, late of Croydon, in Surrey, died at Montfleury, near Cannes, in France, on the 3rd January, 1858, having on the 4th November, 1857, made, and duly executed the will in question.

The plaintiff pleaded that the testatrix, at the time of the execution of the will, and thence until her death, was domiciled in France, and that the will was not made and executed in conformity with, and in manner and form as required for the validity thereof by the laws of the empire of France.

The defendant suggested the death of Chamier, his co-executor, and replied: first, that the testatrix was not domiciled

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CROOKENDEN v. FULLER.

in France; secondly, that the will was made in conformity with the law of France; thirdly, that it was made, with the exception of a certain part, in pursuance of a power contained in the last will of the deceased husband of the testatrix of which she was sole executrix, and of which she obtained probate in 1842.

On the first and second replication issue was joined by the plaintiff, and the third he traversed.

Several witnesses were examined, and the case was argued on the 12th and 14th July.

K. Macaulay, Q.C., *Dr. Addams*, Q.C., and *Roupell* for the plaintiff; the *Solicitor-General* (*Sir H. S. Keating*), *Douglas Brown* and *G. Lake Russell* for the defendant.

The effect of the evidence is set out at length in his Lordship's judgment.

Cur. adv. vult.

Nov. 4.—SIR C. CRESSWELL, after stating the substance of the pleadings, said: It appeared in evidence that the husband of the testatrix died in May 1842, leaving his widow and four children, two sons and two daughters, him surviving. The daughters were married, one to William Chamier (who died after the commencement of this suit), the other to the Rev. George Lowe, incumbent of Upper Ottery, in the county of Devon. The eldest son died in 1843; the other three children survived the testatrix, and she continued to live with them all on terms of great affection during the whole of her life. The testatrix and her husband, until his death, lived on his estate at Bushford, in Suffolk. That was sold in Sept. 1842, and she then removed to Woodthorpe, near Wakefield, where her son-in-law W. Chamier had taken a house. Under her husband's will, she took his plate and furniture, which she removed to her house at Woodthorpe, and lived there with Mr. and Mrs. Chamier till the spring of 1844. They all then left; the testatrix warehoused her furniture at Wakefield, and sent her plate to Child's bank in London, with whom she kept her only banking account during the remainder of her life, and the bankers held a power of attorney to receive all money accruing due to her. Her property consisted of £900 per annum from an estate in Barbadoes, £800 per annum, the interest of money in the funds, two shares in

the Great Western Railway, money at her banker's, plate and furniture. In 1844 she went abroad with Mr. and Mrs. Chamier, and spent the winter at Frankfort, and part of the next year at some German baths, and from that time, in consequence of suffering from rheumatism, she always spent her winters abroad at various places, but in general came to England during the summer months. Thus in 1845 she came to England, and remained for some time at Upper Ottery with her daughter Mrs. Lowe, and she was there again for a considerable time in 1846. In 1845 an additional room was built for her accommodation in Mr. Lowe's house, the expense of which she paid, and that room and one for her maid were always set apart for her use when there, and the principal part of the furniture in them was her own, but at other times they were occupied by Mr. Lowe's family. When she was at Upper Ottery she contributed largely to the expense of the housekeeping. In 1846 her son the plaintiff returned from a visit which he had paid to the West Indies, and wished to settle in London as a physician, and she took the lease of a house in Eaton-square, which she gave up to him; the principal part of her furniture was brought from Wakefield and placed there. She never occupied that house, but when passing through London on various occasions stayed there as the guest of her son. In the summer of 1847 she again came to England, and spent some time at Upper Ottery; the winter of 1847-48 she passed at Paris, and in the summer came to London to dispose of the lease of the house in Eaton-square. In 1850 she was in England from June till August; the whole of 1851 she spent at Changins, in Switzerland, at the residence of an intimate friend, the Countess St. George, with whom she spent two or three months of each subsequent year of her life till 1857, and the house of the countess she used to call her Swiss home. Part of 1852 she spent in England, at Upper Ottery, and when there paid all household expenses except servants' wages. During this year she suffered very severely from rheumatism and sciatica. The whole of 1853 she remained on the Continent, and passed the winter of that year at Cannes, in company with the Countess St. George, occupying part of the house of a Mons. Girard. In 1854 she was in England from August to November—part of the time at Upper Ottery—then returned to the Continent with Miss Anna Lowe,

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and spent the winter at Hyeres, in lodgings. Her son, the plaintiff, was also at Hyeres, at an inn. In 1855 she came to England with Miss Lowe, remained until November, and then returned to France, and went to reside at Montfleury, near Cannes. In the spring of 1855 the plaintiff had made a contract for the purchase of this property of Montfleury, on which there was a dwelling-house. He had seen the property in the winter of 1853, when his mother was at Cannes, and she admired it, but no contract was then made, as he thought the owner asked too high a price. In making this purchase he was encouraged by his mother, who wrote two letters to him respecting it from Hyeres on the 10th and 13th April. In the letter of the 10th of April, apparently alluding to some arrangement about the house, she says:—"As things done cannot be undone, we must make the best of the old lady and her son. For the next year things must remain as they are, and no alterations, new furnishing, or building attempted whilst they are occupants of the house. By the time they leave, it is to be hoped the money will have come in from the West Indies. I wrote on Monday to Child's house, asking if they would advance me on loan £500, and taking my Candle shares as security. If, as I expect, they consent, my Exeter bonds will enable me to make over the £1000 at once, or as soon as you may require it; and I promise I will also hand you the second sum of £1000 as soon as Robertson pays me, requiring no payment of interest; but at my death, the capital to be repaid on that event to my executors. I can perfectly well do without a carriage or horses, and walking exercise is good for my health. It is because I have found lodgings particularly disagreeable in the south of France, that I had resolved to have a place to myself, and not to be where I am almost poisoned with foul air." In the letter of the 13th April, after some congratulations, she says:—"I lost no time in writing to Child's, and dispatched my letter to them on the 9th, as I shall certainly have a letter in good time to draw on them for £1000, but I shall hope to see you at Cannes before the time of payment becomes necessary. I will now tell you what are my intentions respecting you. I propose paying you £100 per annum so long as I continue to occupy the upper part of your house, commencing, if you please, from the 1st October next; and if it will be a convenience to you, have 1500 francs

in advance. I will pay you that sum when I meet you at Cannes, but I would rather have nothing to do with monthly payments of rent," &c. The testatrix lent her son two sums of £1000 each mentioned in one of those letters, and he gave a promissory note for them. The plaintiff and his wife settled at Montfleury in September 1855, and the testatrix joined them in November, and occupied the upper part of the house, according to the proposal which she had made in the letter of the 13th April. The house, when purchased, was partially furnished, and the testatrix bought other articles to make it more complete. She kept a lady's maid, butler, cook, and scullery maid. Until February 1856 she and her son's family took their meals together, but then ceased to do so. In the summer of 1856 she left for Switzerland, taking her lady's maid with her, but leaving the other servants at Montfleury. Before leaving Montfleury she told her son that she intended bringing back friends with her, and that she should want more room, and arranged with him that she should have the whole house except one room, and he in consequence made an addition to a cottage adjoining to accommodate his own family. During the spring of 1856 the testatrix said that the house was too small, and she had to go up and down stairs too much, and she proposed making additions to it, for which plans were prepared by an architect, but that intention was abandoned, as her friends advised her to build an independent house. Plans were prepared accordingly for a house on her son's property at Montfleury, all on one floor, as she thought that would be best adapted to her increasing years and infirmities. On the 30th July, 1856, while staying with the Countess St. George at Changins, she addressed a letter to her son, in which she says:—"I am quite sure you have done all in your power to accelerate the works at Montfleury, but the unfortunate want of water must have retarded them. It cannot be helped. What the unfortunate 'elderly lady's maid' meant was, that we should never live to occupy the new house; to which observation I replied, 'You give me then but a short time to live; pray, speak for yourself,' only it had no reference to building the house, &c., &c. And now for more important matters, on which I trust no mistake can arise. Finding that there existed no probability of getting money from old Robertson, and considering it very desirable that Bréquet should receive his second large instalment, I

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have sold out my Candle shares, to have it in my power to place £1000 at your disposal. This sum will so far diminish your debts to Bréquet as not to deprive you of all your small income which appeared to be the case with your last payment. You need not send me any acknowledgment for this loan; it will be time enough when we meet." The winter of 1856-57 she passed at Montfleury, occupying, with her friends, the whole of the house, with the exception before mentioned, the plaintiff and his wife occupying the excepted room and the adjoining cottage.

In February 1857 an agreement was entered into between the testatrix and her son with regard to the new house which had been commenced on part of the estate purchased by him and was then four or five feet above the ground. By this agreement it appeared that she was to find money for the building; that as to 25,000 francs he was to render no account, but for any further sums required he was to give notes payable, without interest, to her representatives after her death. The house had not been finished at the time of her death, and after that time nothing further was done to it. In May 1857 she received at Montfleury a letter from Mr. Randall, a solicitor in London, whose firm had for many years been her legal advisers.

"May 29, 1857.

"DEAR MADAM,—You will recollect that in the month of October, 1854, you made your will in the English form. There has recently been a decision of the Privy Council, that English persons domiciled (as it is said) abroad, that is, permanently settled abroad without the intention of returning to England, must make their wills according to the laws of the country where they happen to be domiciled, so far as personal estate is concerned, and not according to the laws of England. The place of the domicil at the death of the party is the test to be applied to the validity of the will, and not the period when the will was made, and the property being in England makes no difference. This decision has caused a good deal of well-founded concern in the minds of English persons resident abroad. I should, therefore, be much obliged to you to inform me whether you intend to reside abroad permanently, or whether you have any intention of returning to England? With reference to your will, I take the opportunity of enquiring whether you intend it to operate as a power of appointment over the property secured to you by your late husband's will, as if so, it may be desirable in consequence of some recent decision of the Courts to make it refer more specifically to the power of disposal given to you thereby. If not, it will do as it is, supposing you have enough property to answer the legacies given. The power in Mr. Crookenden's will does not entitle you to leave the property

in which you have a life interest, to others than your children and your grandchildren, &c. I remain, &c.,

"JOHN RANDALL."

To which she replied as follows:—

"Montfleury, près Cannes, Var.

"DEAR SIR,—I am in receipt of your favour of the 29th ult., and learn by it that the late decision of the Privy Council respecting the wills of English persons resident on the Continent, must be conformable to the laws of the country in which they reside, the absurdity of which is apparent to the meanest capacity. A will, therefore, made by a person resident in China must, by the same rule, be amenable to the Chinese laws, or in any other remote part of the earth. I think it would be advisable to have an interview with you on the subject. My visits to England would probably be annual, as long as health and strength is granted me; but I suppose I must be considered as living in France, spending seven or eight months yearly in that country. Hoping, therefore, to see you as soon as I can make arrangements for leaving this place, which I hope may be early in the next month, and of which I will give you early notice, believe me, &c.,

"MARY ANN CROOKENDEN."

The testatrix came to England on the 2nd July, and during her stay there in the month of October Mr. Randall, by her direction, caused a new will to be prepared, which she duly executed so as to satisfy the statute 1 Vict. c. 26, at the house of her brother Col. Fuller, at Croydon, in whose custody it was left, with other papers, amongst which was the promissory note for £2000. Amongst his papers, after her death, a codicil was found in her own handwriting, signed by her, purporting to be attested by two witnesses and bearing date 25th Oct. 1855. The existence of this was not known until after her death. When this new will was executed she destroyed a former will made in 1854. The testatrix, when in England, spent some time, about two months, at Upper Ottery, with her daughter Mrs. Lowe, and expressed a hope that she should be able to come and pay her a longer visit in the next year. She returned to Cannes in November, and died there Jan. 3rd, 1858. In the summer of 1857 some considerable repairs were done to the house at Montfleury by the directions of the testatrix, and were paid for by her executors. During the same summer she caused some of her furniture to be brought from England, and at Montfleury expressed satisfaction at having the favourite things about her.

Such were the principal acts done, according to the evidence before me, from which an inference may be drawn as to the

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domicil of the testatrix. But, in addition to them, each party gave evidence of conversation and declarations, which, unless accompanying acts, have, I think, been properly described as the lowest species of evidence. They must not, however, be discarded, but duly weighed together with the rest of the evidence adduced. In support of the allegation that her domicil was French, it was proved that in the summer of 1856, when at the house of her friend the Countess St. George at Changins, when speaking of building a new house at Montfleury, she said, "You know I have no home in England;" that to Mrs. Crookenden, wife of the plaintiff, she always spoke of Montfleury as her home from her first going there, and as the place where she meant to live all her life. To Mr. Dimes, a gentleman living at Cannes, she said, early in 1857, that she should be glad when the new house was finished, for then she should have a comfortable home of her own; and when about to depart for England, she said she must go there on business, and would then arrange to have her furniture sent over, as English furniture was better than French, and having her old furniture about her would revive agreeable recollections; that when her house was finished she should have room to receive her friends, and that would prevent the necessity of taking long journeys, which she found fatiguing. Another witness, Eliza Williams, stated that she travelled with her to Cannes in Oct. 1855; that on one occasion afterwards, when going to Nice, she said she was glad that it was arranged for her son and herself to settle at Cannes, for it suited her better than Nice, and she was glad he had not resolved to settle at Nice; and that she wished to be near him the remainder of her days. Mary Ann Patteson proved that she accompanied the testatrix from England to Cannes in the autumn of 1857, and she was taken very ill on the journey. During the journey she said she hoped always to live at Cannes, and said the witness was under a mistake in supposing that she could not live at Cannes as comfortably as in England, and that she intended doing so. Ellen Coleridge proved that when the testatrix was on a visit to her daughter Mrs. Lowe at Upper Ottery in 1857, she spoke of the house she was building at Cannes; the witness expressed surprise that she should build at her age; to which she replied, "Oh people always do so abroad, it is so difficult to get houses." The plaintiff deposed that in 1856, in a conversation at Cannes

with his mother and others about the mode of disposing of the bodies of the dead, he expressed himself in favour of burning. She observed, "Don't have me burned; I should prefer lying on the hill;" alluding, as he supposed, to a cemetery there. Augustin Boiniol, British Vice-Consul at Cannes, stated that he became acquainted with testatrix in 1851; that in Jan. 1856 she told him she had participated in the purchase of Montfleury with the intention of fixing her residence there till the end of her days; that after the decision of the case of *Bremer* v. *Freeman*, she expressed much anxiety about her will, and asked his advice upon the subject, saying that she must be considered as domiciled in France; whereupon he advised her to make one that would be legal both in France and England, and explained how it might be done. On the other hand Emilia Fuller (wife of the defendant) proved that the testatrix for many years suffered from rheumatism and sciatica; that she often said that the climate of England was so cold during the winter that she was compelled at that season to reside in the south of France; that when in England in 1857 she said that one of her reasons for coming to England was to make a new will, for some fresh case made her fear that her property would not be distributed according to English law; that she was very fond of the climate of the south of France, but was also very fond of Upper Ottery, and of being there with her grandchildren, and wished she could reside there with safety to her health. Charlotte Fuller (daughter of defendant,) proved that she had frequently accompanied the testatrix abroad for the winter since 1843; that she always spoke of her preference for England over France, and regretted that she could not live there; that she (witness) went to Cannes in the autumn of 1856, and remained with testatrix till June 1857; that at Montfleury there had been conversations about the decision of the Privy Council in *Bremer* v. *Freeman*, and in June testatrix said she should go to England and make a new will. In the winter of 1856-57, testatrix told the witness that she had only taken such things abroad as she wished to leave there, and that the more valuable part of her property remained in England. She mentioned having furniture at the rectory at Chelsea and Upper Ottery, and plate at her banker's, and said that she had taken a very small portion abroad, but took plated articles instead, and sometimes borrowed of her son. The Rev. George

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Lowe, her son-in-law, stated that when the testatrix was with him in 1855, at Upper Ottery, she expressed a wish to spend the winter at the vicarage, but thought it impossible, on account of her health. She also said that she much wished to be buried in Upper Ottery churchyard, where her son had been buried, and that she would leave directions that it should be done. She pointed out a place where she wished a vault to be made, and her son's body to be removed to it. In July 1857, when again at Upper Ottery, she said she understood from Mr. Randall that it was necessary to come to England to make her will, so as to meet the French law; that she could not understand what they meant by saying she was domiciled in France; that she was not so, that she merely went abroad on account of her health, and that, according to that law, a person travelling would have to make a will according to the law of the country where he happened to be at the time. When about to leave Upper Ottery for Chelsea in September 1857, she said that she hoped certainly to return in June 1858, and observed that the house wanted the outlay of a good deal of money, and added, "We will do that when I return next year." The Rev. Thomas Drosier, who had frequently in former years seen the testatrix at Upper Ottery, met her there in 1857, when she told him she was going to London to consult Mr. Randall about her will, and that if there was any danger of her property being disposed of according to French law, she would never set her foot in France again. Ellen Reeves, who had been governess in the family of testatrix, and on intimate terms with her for many years, stated that she passed several winters with her on the Continent, and in 1856 accompanied her to Cannes, and remained there till May 1857. During the winter she spoke of the pleasure of being with relations, and said that, as her health improved, she hoped she might be able to try a winter in England. She often spoke of admiring Upper Ottery, and of the pleasure it gave her to be there with her son and his family, and said that if she could choose her residence she should live there entirely. The witness saw her at Croydon in October 1857, when she said she was obliged to go to a milder climate in consequence of her rheumatic complaints. Fanny Lydiard, a connection of Mrs. Kingsley, the wife of the rector of Chelsea, stated that the testatrix came on a visit to the rectory about October 1857; that Mrs. Kingsley was absent, and witness had to entertain

her; that they conversed intimately about her affairs; that she accompanied her several times to Mr. Randall's, but was not present at their interviews. She told witness that she had been very unhappy about the new law, and was going to alter her will in consequence before she returned to Cannes for the winter, and added that she should never forsake her country.

Upon the second issue, viz., whether the will of testatrix was made in conformity with the laws of the empire of France, one witness only was examined, the Chevalier François de Rosay who had for many years practised as an advocate in Paris. He stated that if a Frenchman, born in France, and who had lived there all his life, were to go to London for a day and there make a will good according to English law, that will would, by French law, be good; and that the same rule would apply to the case of an Englishman born, who had forsaken his domicil of origin, and become domiciled in France. In support of his opinion so expressed the witness referred to Dalloz Rep. 1843, 1st pt., p. 208, from which he read the following passage:—"In order that a will made by a Frenchman in a foreign country be reputed as made by authentic act, it is sufficient that the formalities used in that country have been observed, though no public officer have been employed, if the intervention of a public officer is not required by the law of that foreign country." And he referred also to the report of a case where it had been so held by the court at Rouen, and the decision affirmed on appeal; and this agrees with the opinion said to have been given by Senard (an advocate of the Cour d'Appel in Paris) in the case of *Bremer* v. *Freeman*, 10 Moore, P. C. 324.

Upon this state of facts three points were urged for the defendant in support of his claim to probate: first, that the testatrix never abandoned the domicil of origin, and was, therefore, at the time of her death at Cannes, domiciled in England, and consequently her will made in conformity with the statute 1 Vict. c. 26 was valid; secondly, that according to the evidence of François de Rosay, which was wholly uncontradicted, even assuming the testatrix to have become domiciled in France the will was nevertheless good; and thirdly, that as far as it was an execution of a power given by the will of her deceased husband, the rule that the will must be according to the law of the domicil did not apply, for the rule was founded on the

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maxim *mobilia sequuntur personam*, which could not be applicable to an instrument which merely executed a power over certain property given by another person.

It seemed to me at the time that this third point could not be sustained, for that I could only grant probate of that which is a will, and if a will, it must be a will duly executed, and I can only recognize that as a will duly executed which is in conformity with the law of the domicil; and to this opinion I adhere.

In dealing with the first point raised, namely, that the domicil of the testatrix was English, I have only to consider domicil for the purpose of succession. I do not propose to try the question by a reference to any of the definitions of domicil given by foreign jurists. The very learned and elaborate judgment of Kindersley, V.C., in the case of *Lord* v. *Colvin*, 28 L. J. Chancery 361, shows that none of them would be safe guides in this case; and, indeed, they are all disposed of in a very summary manner by Lord Cranworth in *Whicker* v. *Hume*, Ib. 396, H. of L. The principles upon which the case depends are clearly stated in the judgment of the Master of the Rolls in *Somerville* v. *Somerville*, 5 Ves. 786: first, that a man can have only one domicil for the purpose of succession; secondly, that the original domicil, or, as it is called, the *forum originis*, or the domicil of origin, is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil and taking another as his sole domicil; and this rule has been reaffirmed in several modern cases: (*Munro* v. *Munro*, 7 Cl. & Fin. 842; *Collier* v. *Rivaz*, 2 Curt. 855; and *Hodgson* v. *De Beauchesne*, P. C. December 1858.) Now in this case there is no doubt that the domicil of origin of the testatrix was English, and, according to *Somerville* v. *Somerville*, that must prevail, unless she acquired another, and also manifested and carried into execution an intention to abandon her former domicil. Upon this subject, and upon the nature of the evidence necessary to establish such a case, I think the language of Kindersley, V.C., in *Lord* v. *Colvin*, is well worthy of attention: "In truth, to hold that a man has acquired a domicil in a foreign country is a most serious matter, involving, as it does, the consequence that the validity or invalidity of his testamentary acts, and the disposition of his personal property,

are to be governed by the laws of that foreign country. No doubt the evidence may be so strong and conclusive as to render such conclusion unavoidable: but the consequences of such a decision may be, and generally are, so serious and injurious to the welfare of families that it can only be justified by the clearest and most conclusive evidence."

Let us see, then, what evidence there is of the acquisition of a new domicil, or, as Lord Cranworth describes it, "permanent home," by the testatrix. From 1844 till her death she had no home in England, and, in consequence of rheumatic affections, she always passed the winter abroad, in general returning to England for the summer months, which she spent with different friends, but sometimes she remained abroad throughout the year. From 1844 to 1853 she had no residence abroad which could in any sense be considered as fixed or permanent, and there was no evidence whatever of the acquisition of a foreign domicil. In 1855 she encouraged her son to purchase the property of Montfleury, at Cannes, and assisted him to do so by a loan of £2000. This was relied on by the plaintiffs as evidence of an intention to fix her residence permanently there, and to relinquish her English domicil; but her letters of the 10th and 13th April 1855 furnish arguments to each side. Thus, in the letter of the 10th, she speaks of the arrangements as to alterations, furnishing, &c. to be done at Montfleury, as if it was the concern of both; and further on: "it is because I have found lodgings so particularly disagreeable in the south of France, that I had resolved to have a place to myself, and not to be where I am almost poisoned by foul air;" from which it may be inferred that she intended to establish herself permanently at Montfleury. But, on the other hand, that property was not purchased by her, but by her son, and was conveyed to him. She had lent him £2000 to help him to pay for it; but that was to be repaid by him to her executors, and he gave her a promissory note for it; and with regard to her resolution to have a place to herself, it may well be that she meant it, not as a permanent residence throughout the year, but in substitution for the lodgings which she had been in the habit of taking at various places for the winter months. Again, in the letter of the 13th April she speaks of the arrangements as to having possession of Montfleury as his business; and then proceeds to state what are her intentions towards him:—"I propose paying

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you £100 per annum as long as I continue to occupy the upper part of *your* house, commencing if *you* please, from the 1st of October next." She offers to pay a sum in advance, but adds, "I would rather have nothing to do with monthly payments of rent, &c.;" and this was relied on for the defendant as showing that the testatrix did not mean to make any permanent arrangement, but only to pay as long as she continued at Cannes, contemplating the probability of ceasing to occupy the apartments agreed for. The meaning of these passages in her letters may be doubtful. She may have meant to say that she intended to reside altogether at Montfleury, or that she should always resort there in the winter, instead of passing it sometimes at one place and sometimes at another as theretofore. But upon the other branch of the question, viz., whether the testatrix had manifested and carried into execution an intention of abandoning her former domicil and taking Cannes as her sole domicil, the codicil produced is very material evidence. The place where it was made was not proved, but it bears date the 26th October 1855, and was therefore probably made just before she commenced her journey to Montfleury to take up her abode there, and tends strongly to show that she did not, by concurring in that purchase and making arrangements to occupy a part of the chateau, intend to abandon her domicil of origin; and this codicil is in exact conformity with the conversation spoken to by Mr. Lowe as to her desire to be buried at Upper Ottery, and, by proving his correctness in that particular, tends to confirm his evidence as to her statement that she much wished to pass the winter at Upper Ottery, but could not on account of her health. It is to be remarked that she does not appear at any time to have relinquished her wish to be buried at Upper Ottery, for when the will now in question was made, the will of 1854 was destroyed, but this codicil was preserved and found amongst her papers after her death. On the other hand, her son, the plaintiff, spoke of a conversation he had with her in 1856, at Cannes, as expressing a desire to be buried in the cemetery at that place; but it seems to me that very little reliance can be placed upon it. In a casual conversation respecting the various modes of disposing of dead bodies which had been adopted by different nations, Dr. Crookenden expressed an opinion in favour of burning, upon which she said, "Don't have me burnt;

I should prefer lying on the hill," where the cemetery was situate. From such an expression, used under such circumstances, I should infer nothing more than that she had rather her corpse should be buried than burnt.

Upon this evidence I am of opinion that the plaintiff has failed to establish that, when the testatrix took up her abode at Montfleury in November 1855, she had either acquired a French domicil, or manifested an intention of abandoning her domicil of origin.

Having spent the winter of 1855-56 at Cannes, she left as usual early in summer, and went to Switzerland, and as she wished to have friends with her during the next winter, she arranged with her son for the occupation of the whole of the chateau, with some rather trifling exception, and several friends spent the winter with her there. During the preceding winter she complained that the accommodation in the chateau was not sufficient, and that she had to go up and down stairs more than suited her. At one time alterations and additions were proposed, but afterwards she arranged for the construction of a new house all on one floor, on her son's property at Montfleury, and on the 14th February, 1857, the agreement already stated was made between them. The house had been commenced and was in progress when she received Mr. Randall's letter of the 29th May.

The next point to be ascertained is, whether between the time of her leaving Montfleury for Switzerland in 1856, and the receipt of that letter, she had done anything to change her domicil. The arrangement for occupying nearly the whole of the chateau, and having her friends during the winter, is in my judgment quite insufficient for that purpose. The agreement with her son to build another house for her use, and to pay a large sum towards it, is certainly evidence of an intention to settle there permanently; but it may have been merely with a view to passing her winters there, and at all events rather refers to some purpose to be executed in future than any present determination to remain there and relinquish all connection with England. Her conversation with Mr. Dimes has that aspect. Mons. Boiniol, indeed, said that when the case of *Bremer* v. *Freeman* and the effect which the decision might have upon her will was discussed, she said she must be considered as domiciled in France. But it is difficult to discover

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what she then meant by the term domiciled. In her answer to Mr. Randall's letter, she uses the word "reside," and in answer to his inquiry whether she meant to reside permanently abroad, she says, "My visits to England will probably be annual as long as health and strength is granted to me; but I suppose I must be considered as living in France, spending seven or eight months yearly in that country;" and probably she meant the same thing by her expression to Mons. Boiniol. But had she in this manner and to this extent resided in France, intending to abandon her former domicil and take another (viz., at Montfleury) as her sole domicil? Considering her act in coming to England, and making a will there for the express purpose of preventing the distribution of her property according to French law, although she had been told that her will must be made according to the law of her domicil; her conversation with her son-in-law, Mr. Lowe, when she said, "She could not understand what they meant by saying she was domiciled abroad; that she was not so, but merely went abroad on account of her health;" her declaration to Mr. Drosier that if there was any danger of her property being disposed of according to French law she would never set her foot in France again; her declaration to Miss Lydiard, who accompanied her to Mr. Randall's office, that she should never forsake her country, I cannot come to the conclusion that she had then abandoned her domicil of origin, or so fixed her residence in France as to render the loss of that domicil a necessary consequence. These declarations were followed by the execution of a will, in which she described herself of Croydon, late of Camden-town, never mentioning France; and it is impossible to suppose that, if she had not already changed her domicil, she then intended to do so; and her conversation with Ellen Coleridge in August 1857 and with Mary Ann Patteson during and at the end of her journey back to Cannes, when she expressed her thankfulness at being at home, must be construed with reference to such a home and such a residence there as would be compatible with her retention of her English domicil. The burden of proof of this issue is on the plaintiff, and although he has adduced a good deal of evidence tending to establish the affirmative, that has been met by evidence of such a nature tending to a contrary conclusion that I feel it impossible to say that the testatrix ever *animo et facto* abandoned her

English domicil and acquired another in France. Upon the first point, therefore, my opinion is in favour of the defendant.

Upon the second question, viz., whether the will in question was made in conformity with the laws of France, the evidence was all on one side. I am bound to deal with the law of France as a question of fact to be ascertained as any other fact in dispute. Now, the Chevalier de Rosay, an experienced French advocate, deposed that, according to the law of France, the will is good, assuming the testatrix to have been domiciled in that country. No conflicting evidence was given, and if the matter had rested there, I should have been bound to act upon the evidence so given. But the Chevalier confirmed his opinion by reference to Dalloz, and a decision expressly in point affirmed on appeal. Upon this question also I must therefore decide in favour of the defendant.

The result is, that the Court pronounces for the will, and orders the probate to be delivered out to the surviving executor.

Macaulay moved for an order for the payment of costs out of the estate.

The *Solicitor-General* said he did not oppose the application on the part of the executors.

SIR C. CRESSWELL: As no opposition is offered, it is reasonable that the order should be made.

Probate delivered out to the executor; costs out of the estate.

DIVORCE AND MATRIMONIAL. Nov. 4, 1859.

BARNETT *v.* BARNETT.

(BEFORE CRESSWELL, J.O.)

BARNETT *v.* BARNETT.

Judicial separation—Cruelty—Hearing causes in camerâ.

The Judge Ordinary has no power, even with the assent of both parties to a suit, to order it to be heard *in camerâ* (*a*).

This was a petition by a wife for a judicial separation on the ground of cruelty. The cruelty charged consisted of various acts of bestiality. The respondent pleaded a denial of the allegations in the petition.

Dr. Phillimore, Q.C. (with him *Dr. Swabey*), for the petitioner, moved that the case might be heard *in camerâ*.

CRESSWELL, J.O.: I should have been very happy to have granted the application, but you will remember that in the course of the last Session of Parliament a bill was brought in to amend the Divorce Act which contained a clause, giving the Judge Ordinary a discretion as to hearing cases with closed doors. The Legislature in their wisdom rejected the clause. I think I am bound to take that rejection as a prohibition of the exercise of my discretion. They refused to vest that discretion in the Judge Ordinary, and therefore I cannot assent to the application.

Edward James, Q.C., for the respondent: Both parties concur in the application.

CRESSWELL, J.O.: I should be only too glad to grant it if I had the power. But I was anxious to have my power defined clearly, and as there was a fair opportunity of asking the opinion of the Legislature upon it, I requested that the clause might be inserted. After a good deal of objection it met with the approbation of the House of Lords. The Attorney-General who introduced the bill into the House of Commons supported it, but it was rejected, and I think that rejection is

(*a*) See Hall (falsely called Castleden) *v.* Castleden, post, p. 29.

tantamount to a prohibition to my exercising any discretion in the matter. I can however exercise the same authority as other Courts in desiring females and children to leave the Court. I regret very much that I cannot do more, but I must be bound by the decision of the Legislature. Only one mode occurs to me of meeting the difficulty. I have power to say how evidence shall be taken, and if both parties desire it, I may perhaps order the case to be proved by affidavit. The full Court has heard two cases in private, when the present Lord Chancellor (Lord Campbell), then Lord Chief Justice, was presiding. I thought that the matter might, perhaps, be questioned, and that it would be better to get the authority of the Court defined. But a majority of the House of Commons did not think that the Judge Ordinary ought to be vested with such a discretion. I have power to order cases to be proved by affidavit, subject to the right of each party to call for the production of the witnesses on the other side, to be subjected to cross-examination. I think I may order the case to be proved by affidavit, but when the affidavits have been made, the discussion upon them must be in public.

Dr. Phillimore: I am afraid that it is impossible for my client to assent to the case being tried by affidavit, because it will be necessary for me to cross-examine the witnesses on the other side.

The case was accordingly heard in public, but after the examination and cross-examination of the petitioner the petition was withdrawn.

PROBATE.
NOV. 3 & 10.

In the Goods of JAMES WEBSTER, deceased.

(BEFORE SIR CRESSWELL CRESSWELL.)

In the Goods of JAMES WEBSTER, deceased.

Confirmation and Probate Act, 1858, 21 & 22 *Vict. c.* 56, *s.* 12.—*Duplicate Confirmation.*

The executors of the will of a domiciled Scotchman obtained confirmation from the Commissary Court and sent it to the colony of Victoria. They then obtained a duplicate confirmation from the Commissary Court and produced it in the Registry of the Probate Court in order to have the seal of that Court affixed under the 12th sect. of the 21 & 22 Vict. c. 56. The Court held that it could not take notice of the fact that the confirmation was a duplicate, but was bound to give faith to the Commissary's certificate, and ordered the seal to be affixed accordingly.

James Webster, formerly of the colony of Victoria, died on the 29th March, 1859. At the time of his death he was domiciled in Scotland, and he left a will and codicil dated respectively the 2nd March, 1856, and the 22nd October, 1856. He appointed executors in Scotland and in Victoria, and the Scotch executors obtained confirmation from the Commissary Court. This confirmation they sent to Victoria, and the Commissary Court had since granted them a duplicate confirmation.

Dr. Swabey moved that the seal of the Court might be affixed to this duplicate confirmation, in order to enable the executors to realise some property of the deceased in England. The 12th sect. of the Confirmation and Probate Act, 21 & 22 Vict. c. 56, enacts that "when any confirmation of the executor of a person who shall in manner aforesaid be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in England, shall be produced in the Principal Court of Probate in England, and a copy thereof deposited with the Registrar, together with a certified copy of the interlocutor of the Commissary finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect

PROBATE. Nov. 3 & 10.

In the Goods of JAMES WEBSTER, deceased.

in England as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate."

SIR C. CRESSWELL: If I am at liberty to take all the facts into consideration, they will raise a very nice question. The Commissary has thought fit to grant what he calls a confirmation under the seal of the Court—whether wisely or not, I have perhaps no right to consider. I do not know that this Court has any option in the matter when that confirmation under his seal is brought into the Registry. Was such a thing ever heard of as a grant by the Prerogative Court of a second probate because the first had been carried out to India or elsewhere? Let the motion stand over.

November 10.—*Dr. Swabey:* I have nothing to add to what I have already laid before the Court.

SIR C. CRESSWELL: I shall order the seal of the Court to be affixed to the confirmation produced, on the ground that I can take no notice of the circumstances you have stated showing that it is a duplicate. I must give faith to the certificate of the Commissary. If the instrument to which the seal is affixed is not, properly speaking, a confirmation, that is his affair, not mine.

Motion granted.

(BEFORE SIR CRESWELL CRESSWELL.)

PROBATE. Nov. 10, 1859.

In the Goods of W. H. BOOTH, deceased.

In the goods of W. H. BOOTH, deceased.

Administration—Presumption of Death and Intestacy.

W. H. Booth deserted his wife and went to America, where he was seen on two occasions more than seven years ago. Five years ago a legacy of £300 became payable to him in consequence of his father's death: but although he knew he should be entitled to it upon his father's death, it had never been claimed. The Court refused to presume from these circumstances that he was dead and intestate, and rejected an application for a grant of administration to his widow.

Aspland moved for a grant of letters of administration to

PROBATE. Nov. 10, 1859.

In the Goods of W. H. BOOTH, deceased.

Martha, the widow of W. H. Booth. The affidavits in support of the motion were to the effect that W. H. Booth deserted his wife in 1851, and had not communicated with her since; that in the same year an order was made upon him by the poor law guardians of his parish for the payment of 8*s.* a week for the support of his family; that he then absconded and was traced to Liverpool; that he was seen on two occasions, both of them more than seven years ago, in Philadelphia, and with those exceptions that no one had seen or heard of him. It further appeared that in April, 1853, an account was published in some American newspapers of the death of a man by drowning who answered his description. Five years ago a legacy of £300 became payable to him in consequence of his father's death; and he knew he should be entitled to it when his father died, but it had not been claimed. He had been advertised for, but without result.

SIR C. CRESSWELL: At present it would be rather dangerous to make the grant. What evidence is there that he died intestate? You should state when, and in what terms, and in what papers you advertised. The ordinary presumption that a man who has not been heard of for seven years is dead proceeds on the ground that he probably would have been heard of if he was alive. But I do not know why I should suppose that a man is dead because he has run away from his wife and gone to America, and never written to her.

Application refused.

DIVORCE AND MATRIMONIAL. Nov. 13, 1859.

CIOCCI *v.* CIOCCI.

(BEFORE CRESSWELL, J.O.)

CIOCCI *v.* CIOCCI.

Judicial Separation.—Adultery.—Petition by a Wife Divorced a mensâ et thoro *by an Ecclesiastical Court.*

A wife who had obtained a decree from the Consistory Court of London for a divorce *a mensâ et thoro*, on the ground of adultery, filed a petition for a judicial separation, containing the same allegations as those on which the former decree was founded. The Judge Ordinary did not decline to

receive the petition, but intimated a doubt whether he had jurisdiction to re-hear the case.

Mrs. Ciocci instituted a suit against her husband in the Consistorial Court of London for a divorce *a mensâ et thoro*, on the ground of adultery and cruelty. The husband appeared and denied these charges: and the Court after evidence and argument pronounced for the prayer of the wife on the ground of adultery but not on that of cruelty. (1 Spinks, p. 121.) She had since filed a petition in this Court for a judicial separation, on the ground of adultery, in which she alleged the same facts as those upon which the decree of the Consistory Court was founded.

Dr. Phillimore, Q.C., moved under the 5th sect. of the 21 & 22 Vict. c. 108, that the evidence taken in the suit in the Ecclesiastical Court might be used in support of the petition for a judicial separation. The object of the petitioner was to obtain protection for her property.

CRESSWELL, J.O.: I doubt whether you can call on this Court to re-hear all the divorce cases which have been decided in the Ecclesiastical Courts whenever a petitioner thinks some advantage can be gained by a decree of this Court. She perils nothing, for if I dismiss her petition she still remains divorced. My present impression is against the jurisdiction of the Court to try over again cases which have been tried in the Ecclesiastical Courts. The proceedings in those Courts were a necessary preliminary to an application to the House of Lords, and the jurisdiction of this Court is substituted for that of the House of Lords in cases of dissolution of marriage. I shall not refuse to receive the petition, but I hope when it comes on for hearing the question will be fully discussed, as it is one of considerable importance. I dare say there are many cases in which wives will be anxious to avail themselves of the powers of this Court, which are beyond those of the Ecclesiastical Courts, as to custody of children, &c.

Application granted.

PROBATE.
Nov. 4 & 11.

GWILLIM and DUGGAN *v.* GWILLIM and Others.

(BEFORE SIR CRESSWELL CRESSWELL.)

GWILLIM and DUGGAN *v.* GWILLIM and Others.

Wills Act.—Attestation.—Imperfect Recollection of Attesting Witnesses.

The attesting witnesses of a will, duly executed upon the face of it, were unable to recollect having seen the deceased's signature upon the will when they affixed their signatures, although they did not say it was not there. The Court held that it was not bound, in consequence of their refusal to swear that the deceased had signed the will before or at the time of the attestation, to assume that he had not done so, but that it was at liberty to consider whether, looking at all the circumstances of the case, the will had been duly executed, and being of opinion that it had, granted probate to the executors.

This was a cause of proving in solemn form the will of the late Rev. John Gwillim, who died on the 16th May, 1859. By a will dated the 31st March, 1856, he appointed the plaintiffs executors. They propounded the will which purported to be duly executed. The defendants, who were various parties entitled in distribution if the deceased was intestate, pleaded that the will was not duly executed in accordance with the provisions of the 1st Vict. c. 26, s. 9.

Dr. Deane, Q.C., *Hawkins*, Q.C., and *Dr. Wambey*, appeared for the executors; *Manisty*, Q.C., *Dr. Phillimore*, Q.C., *Dr. Swabey* and *Dr. Tristram* for the various defendants.

The two attesting witnesses were examined, and the material parts of their evidence, and the question as to the attestation arising from it, are stated in his Lordship's judgment.

Cur. adv. vult.

November 11.—SIR C. CRESSWELL: I have had the opportunity, since this case was argued, of looking over the case of *Lloyd and Hart* v. *Roberts*, decided by the Judicial Committee, Mr. Moore having been kind enough to furnish me not only with the papers, but also with notes of the judgment of Dr. Lushington. The question in the present case is, as to the due execution of a will. The will appears, on the face of

it, to have been regularly executed. Part of it seems to have been written at one time, and part at another. The date is March 31st, 1856, and the two attesting witnesses are Elizabeth R. Gwillim and Harriet Gwillim. These are two old ladies who are related by marriage to the Rev. John Gwillim, the testator, being the widows of his two brothers. They say that about the time when the will purports to have been executed, they were all together at a house called Grange, belonging to Harriet Gwillim; that the alleged testator one morning came into the room where they were sitting, and asked them to witness his will. They state that they did accordingly write their names as he told them, but neither of them recollected seeing his name on the paper at the time. They do not deny that it was there, but they say they do not recollect seeing it there. One of them, Harriet, states that when he asked them to witness the will he was at a table near the fire, and that when she looked at the table the will was on it, and also an inkstand which generally stood on a cheffonier in another part of the room. If the attesting witnesses to a will are dead, the assumption is that everything has been rightly done. But I will not say, the witnesses not being dead, that everything must be assumed not to have been rightly done that they do not remember to have seen. The objection to the execution was, that there seemed to be an imperfect acknowledgment of the signature. If it were necessary to have direct evidence that the name of the testator was on the will when he acknowledged it by asking them to witness his will, the proof of the execution would fail; but that certainly is not necessary, for the contrary was decided in *Cooper* v. *Bockett* (4 Moore P. C. C., p. 419). The other case in the Judicial Committee went a great deal further, because there the only surviving attesting witness denied the existence of a will at the time of the attestation. In that case, *Lloyd and Hart* v. *Roberts*, one of the two attesting witnesses was dead; there was an imperfect attestation clause, and the other attesting witness was examined. He stated at first, that he was asked by the testator to witness his will, but afterwards, on being cross-examined as to whether the testator himself asked him, he said that a female servant of the testator had come and said to him that the testator wanted him to witness his will. He further stated, that on entering the room he saw a paper, and on that paper he saw

PROBATE. Nov. 4 & 11.

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the name of the testator in the testator's handwriting, so far proving affirmatively the existence of the signature; but he went on to state, that the attestation was not there, and further that nothing whatever was written above the testator's name. The will, a very short one, was in fact, written above the testator's name, and therefore, the witness denied the existence of the will at the time when the signatures were attached. But from the whole circumstances of the case, the Judicial Committee were perfectly satisfied that the will was there at the time, and that it was probably duly executed. That case goes a good deal further than this. I am, therefore, at liberty to judge from the circumstances of this case, whether the name of the testator was on the will at the time of the attestation or not. It is hardly likely that this testator, who knew that there must be two witnesses to the will, did not also know that he must sign it before they did, and either sign it or acknowledge it in their presence. Then, if I look at the position of the words, I find at the top of the third page, "My will and testament, 1856, March 31st." Under that comes "Grange, March 31st, 1856," that being the time and place at which the old ladies say they were asked to sign the will. Under that comes "John Gwillim," and then the word "witness," a little below on the left-hand side where one would expect to find it. I cannot, therefore but think, that the name of the testator was written at that time, and that by asking those old ladies to witness his will, he did acknowledge his signature.

Manisty applied for costs of the opposition out of the estate.

His Lordship allowed the costs of all the parties to be paid out of the estate.

(BEFORE THE FULL COURT:—CRESSWELL, J.O.; WILLIAMS, J., AND BRAMWELL, B.

HALL (falsely called CASTLEDEN) *v.* CASTLEDEN.

Nullity.—Impotency.—Hearing Causes in camerâ.

The full Court (concurring with the opinion expressed by the Judge Ordinary in a previous case) held that it had no power to order a case to be heard with closed doors.

This was a petition for a declaration of nullity of marriage, on the ground of the impotency of the husband. The respondent did not appear.

Dr. Deane, Q.C., for the petitioner (with him *Dr. Spinks*), moved that the case might be heard *in camerâ*.

CRESSWELL, J.O.: I have already given my opinion as to the power of the Court to grant such an application, (*a*) but I have now the assistance of two learned Judges, and I will put it to them.

After consultation,

Williams, J., said: I am of opinion that we cannot hear the case except in open Court. If this question had been presented to me the first time it was raised, I should have been of opinion that this being a new Court and nothing being said in the Act by which it is constituted to take it out of the ordinary rules which apply to other Courts, it must be considered as constituted with all the incidents appertaining to other Courts, one of which is that the proceedings must be in public. But although that would be my own opinion, yet, inasmuch as I am informed that learned Judges who have sat here before me thought they had power to hear cases privately, I should not act on that opinion. But assuming that I am wrong, and that the Court had a discretion to hear cases in private, if it should be of opinion that the circumstances were such that public decency would be shocked if the public were

(*a*) See Barnett *v.* Barnett, ante, p. 20.

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HALL *v.* CASTLEDEN.

not excluded, the question is, how that discretion should be exercised, and whether we should now hear cases in private? Having heard, upon authority which leaves no doubt as to the fact, that a clause was introduced into the Act of last session giving power to the Court to hear cases in private, and that in the course of the passage of the bill through Parliament that clause was struck out by the legislature, I cannot avoid coming to the conclusion that our discretion ought to be exercised in accordance with the view taken by the legislature, and that we ought to refuse this application.

Bramwell, B.: If this had been the first time such an application had been made, I also should have thought that this being a new Court was constituted with the ordinary incidents of English Courts of Justice, one of which is publicity. I do not understand what doubt there can be upon the matter. My only doubt arises from my knowledge, that since its constitution the Court has sat in private; but, as I understand, it has done so by consent of both parties to the suit, not after opposition made, and a solemn discussion of the matter. I confess I have considerable difficulty in acceding to the other part of my learned brother's argument, because, although the clause was struck out of the Bill of last session by one branch of the legislature, it was inserted by the other, and it is difficult to know for what reason it was struck out. Although the legislature would not affirm its principle, on the other hand it would not negative it by a declaratory or other enactment. But on the other point I concur with my learned brother, and I think that the application should be refused.

The case was accordingly tried in open Court, and judgment was deferred.

(BEFORE SIR CRESSWELL CRESSWELL.)

In the Goods of JOSEPH LEESON, deceased.

Administration.—Next of Kin in India, Administratrix in France, and Sureties in England.

An intestate's next of kin, living in India, appointed a person living in France, their attorney, to take out letters of administration in England; and that person made the usual affidavit and entered into a bond with two sureties who lived in England. The Court under these circumstances granted letters of administration.

Joseph Leeson, a captain in the 42nd Regiment of Bengal Native Infantry, died on the 15th February, 1848, in the East Indies, intestate. He left him surviving a widow, who has since died also in the East Indies, intestate, and without having administered to him. They had five children, all of whom survived them, and lived in the East Indies; and one of these, a married daughter, Mrs. Fanshawe, appointed her aunt, Miss Leeson, who resided at St. Servan, in France, her attorney, for the purpose of taking out administration to her father's property in England. Miss Leeson was duly sworn administratrix, and entered into a bond with two sureties, Messrs. Simpson and Dimond, solicitors, living in London. It was objected in the Registry that a grant of administration could not be made to an attorney who did not live in England.

Dr. Middleton moved for a grant of administration to Miss Leeson, and cited *In the goods of O'Byrne*, 1 Hagg. p. 316.

SIR C. CRESSWELL: As the next of kin lives in India, whilst the attorney is only on the other side of the Channel, and as she has executed a bond with two sureties who reside in this country, you may take the grant.

Administration granted.

(BEFORE THE FULL COURT:—CRESSWELL, J.O.; WILLIAMS, J., and BRAMWELL, B.)

HASWELL *v.* HASWELL and SANDERSON.

Dissolution of Marriage.—Divorce Act, 20 & 21 *Vict. c.* 85, *Secs.* 31 *and* 43.—*Examination of Petitioner.—Reasonable Excuse for Separation.*

The Court will not allow a petitioner to be examined in support of his petition, under the 43rd Sect. of the Divorce Act; but where a petitioner has affirmatively established the allegations in his petition, and there is no affirmative evidence that he has been guilty of adultery, or of unreasonable delay in presenting or prosecuting the petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has contributed to the adultery, the Court will examine him before exercising the discretion given to it by the 31st Sect. and refusing a decree.

A husband unexpectedly entered a room, and discovered his wife sitting on a sofa by the side of a young man, who was taking indecent liberties with her. He withdrew from cohabitation, and when he discovered, at a subsequent period, that she was living in adultery with another man, he presented a petition for a dissolution of marriage. The Court held that he had not wilfully separated himself from her without reasonable excuse, and pronounced a decree of dissolution.

The petitioner, John Haswell, prayed for a dissolution of his marriage with Mary Jane Haswell, on the ground of her adultery with Sanderson. The respondent and the co-respondent did not appear.

The effect of the evidence given in support of the petition was as follows—On the 25th May, 1852, Haswell, who was an artist, then about 21 years of age, was married clandestinely to Mary Jane Blackwell Gilbert. Her mother kept an eating-house and beer-shop in East Cheap, in the city of London, where he made her acquaintance. Being in very poor circumstances, and wishing to conceal his marriage from his father, who lived in Talbot-court, Gracechurch-street, he did not reside with his wife, but occasionally passed the night

with her at her mother's house. Towards the end of 1852, he ceased to see her or to have communication with her, and between that time and the filing of this petition, he had lived partly in Scotland and partly in London. In 1854, his father accidentally found a letter in his desk with the signature "Mary Jane H.," and knowing it to be in the handwriting of Mrs. Gilbert's daughter, sent for her, questioned her, and discovered the marriage. She was received by the family, and occasionally visited them for a short time; but Haswell wrote a letter from Scotland in which he stated that he had withdrawn from cohabitation in consequence of her misconduct, and they then ceased to hold communication with her.

It was also proved that subsequent to 1854, she had lived in lodgings at New Cross with Sanderson as his wife.

With regard to Haswell's withdrawal from cohabitation, the following witnesses were examined:—

Agnes Haswell, his sister, said that she had spoken to him about the respondent's loose behaviour, of which she had heard from her servants; but was unable to fix the date of the communication with any precision.

Jane Cooper said, that in 1852 and 1853, when she was in the service of the petitioner's father, she had seen the respondent walking about the streets with different gentlemen, and had spoken about her to Miss Haswell.

Mrs. Harriet Bailey, a cousin of Mrs. Haswell, who had lived with her at Mrs. Gilbert's, before and after her marriage, said she was always very flirty, and allowed gentlemen to take liberties with her and to kiss her. Witness remembered the quarrel between Haswell and his wife about a young man named Holmes, but could give no precise account of the date of that quarrel or of the separation.

Daniel Joseph Bailey, the husband of the last witness, said he had known both the parties since 1847 or 1848. He and Haswell used to visit and go out with his present wife and Mrs. Haswell. He was married in 1853, and soon afterwards his wife told him of Haswell's marriage with the respondent. He saw the respondent after Haswell separated from her, and she told him that the cause of their quarrel was that "John came in one day in a hurry and caught her in the front room with Holmes."

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HASWELL v. HASWELL and SANDERSON.

Dr. Phillimore, Q.C. (with whom was *Dr. Spinks*), at the close of the petitioner's case, submitted that if their Lordships were not satisfied with the evidence, they should call the petitioner under the 43rd Sect. of the 20 & 21 Vict. c. 85—"The Court may if it shall think fit, order the attendance of the petitioner, and may examine him or her, or permit him or her to be examined or cross-examined on oath on the hearing of any petition; but no such petitioner shall be bound to answer any question tending to show that he or she has been guilty of adultery." The full Court had in previous cases examined the petitioner under that Sect., when the marriage and adultery had been established, but the evidence had not raised any doubt in its mind as to the propriety of making a decree.

CRESSWELL, J.O.: The true construction of that Sect. is that a petitioner may be called by the other side or by the Court to satisfy itself upon a matter adverse to his interest. But you wish to call him under that Sect. to support his own petition.

After consultation with the other learned Judges,

CRESSWELL, J.O., said: We have considered the point as to the examination of the petitioner, in connection with the 31st Sect. of the Act, and it appears to us that where a petitioner has established allegations of adultery against his wife, it must be established affirmatively that he has deserted or wilfully separated himself from her without reasonable excuse, before the Court has power to exercise the discretion given to it by that Section and to refuse a decree on that ground. As the case at present stands, it appears to us that the petitioner has established a case of adultery, and that it has not been affirmatively established that he withdrew from the respondent without reasonable excuse, because certain circumstances have been proved which have a tendency to show that there was a reasonable excuse for the withdrawal, and there is no affirmative evidence the other way. We are not prepared to accede to Dr. Phillimore's argument upon the 43rd Sect., but inasmuch as in order to resist the application for a decree by exercising the discretion given to us by the 31st Sect., it still remains to be established that there was desertion on the part of the petitioner or absence without reasonable excuse; and inasmuch as the Court may, by calling the petitioner, compel him to

prove that there was desertion or absence without reasonable excuse, it will under that Section examine him. That is a very different thing from calling him to establish his own petition affirmatively. The full Court has from time to time expressed an opinion that a petitioner can only be called in order to be examined adversely, and I should be very glad to have the question argued by counsel on both sides and solemnly decided by the full Court. (*a*)

The petitioner was then sworn, and in answer to questions put by the Court, said: At the time of my marriage I was living at Kingsland. About six months after the marriage I went to live in Lyon's Inn, because it was nearer the office of the "Lady's Newspaper," upon which I then had an engagement as an artist. I went there about the time of the Duke of Wellington's funeral, in November, 1852. My wife came to me once in Lyon's Inn for some letters, after the quarrel. I did not live with her, because I was not in sufficiently good circumstances to keep her. I left her about two months before the Duke's funeral, in consequence of reports I had heard from my sister, and also of what I had seen. I went to her

(*a*) In the case of *Evans* v. *Evans*, heard on the 24th Nov. 1859, before CRESSWELL, J.O., WIGHTMAN J. and BYLES, J., evidence was given on the part of the petitioner of marriage in 1853, cohabitation until 1855, when the petitioner went to Australia, his return in 1858, and the adultery of the respondent during his absence. But certain facts were elicited in the course of the case which led the Court to infer that he had wilfully separated himself from the respondent, without reasonable excuse. It appeared that he had shipped as a sailmaker for the voyage out to Australia and home, that on his arrival in Australia he had unexpectedly gone to the gold diggings, that the respondent was grieved at his prolonged absence, and wrote imploring him to return, and that although he had made some provision for her support, it was inadequate, and she had been compelled to sell her furniture, and to remove to Liverpool, where the adultery was committed, and to go into service. As the Court was not satisfied with the evidence as to the circumstances of the petitioner's departure for Australia, *Littler* requested that he might be examined upon that point.

CRESSWELL, J.O., said: It is my settled opinion, and I shall act upon it until I am overruled by a majority of the Court, that we cannot with propriety exercise the discretion given to us by the 43rd Sect. by examining a petitioner in support of his own case. It would be monstrous to suppose that the Legislature had conferred on the Judges the power of calling a petitioner in support of a petition, and not that of calling a respondent in support of an answer. Even if that power were given I think they would exercise a wise discretion by refusing to use it.

The case was allowed to stand over, to give the petitioner an opportunity of laying further evidence before the Court as to his separation from the respondent.

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mother's house one day, went up-stairs suddenly, and on entering the front room, I found her on the sofa, with Holmes, and his hand was in her bosom. It was a sitting-room. That was six weeks or two months after the marriage. I saw her once or twice afterwards, but never went to her mother's house, or had conjugal intercourse with her. I lived in London at least a year after that affair, and went to Scotland in 1854. When I saw her and Holmes together, I went out of the house to consider what I should do. I returned almost immediately, and reproached her with her conduct with Holmes and also with Fraser, about which I had been told. She entreated me to forgive her. I said I would never live with her or see her again. She cried, and said Holmes had been taking liberties with her, and she could not help it. I visited her mother's house for about two years before the marriage. I used to go up-stairs and talk with her. Other young men were not accustomed to go up-stairs, unless they were intimate friends, like myself and Bailey. I never saw other young men flirting with her.

CRESSWELL, J.O., said, the learned counsel might suggest any question which he thought necessary to explain the petitioner's evidence.

No question being suggested,

CRESSWELL, J.O., gave judgment: The Court found some difficulty in putting a construction on one branch of the 31st Sect. As to the first part of that Section, we were satisfied that the case for the petitioner had been proved, and there was nothing to show that he was accessory to, or conniving at the adultery, or had condoned it, or that there was collusion. But then comes a proviso, "that the Court shall not be bound to pronounce such decree, if it shall find that the petitioner has, during the marriage, been guilty of adultery, or if the petitioner shall, in the opinion of the Court, have been guilty of unreasonable delay in presenting or prosecuting such petition," (now here he has not been guilty of unreasonable delay), "or of cruelty towards the other party to the marriage" (nor has he been guilty of cruelty), "or of having deserted,"—we cannot say that he has deserted. Perhaps the meaning of "desertion" there is not very clear, but it probably means

something equivalent to leaving the wife destitute. If the word "deserted" stood alone, it might perhaps have received the interpretation of leaving her by herself, but it is followed by the words, "or wilfully separated himself or herself from the other party before the adultery complained of." Here it appears that the petitioner did wilfully separate himself from the other party before the adultery complained of; but the proviso goes on, "and without reasonable excuse." The evidence as to his going away was very obscure and uncertain, both as to the dates and the facts. Its effect was, that he went away in consequence of a quarrel about Holmes, and that she had said that she had quarrelled with her husband because he "had caught her in a room up-stairs with Holmes." Undoubtedly, that expression is capable of several interpretations, and it is impossible for the Court to say that a man who left his wife because "he caught her in a room up-stairs with a young man," left her without any reasonable excuse. It is not necessary that the precise excuse should be established, but the Court has to see whether the contrary can be established, namely, that there was no reasonable excuse. But inasmuch as the expression is equivocal, we thought it might turn out that he had not caught her in a position or under circumstances to justify him in withdrawing. It turns out, however, from his evidence, that he found her at the time in question submitting to indecent liberties. The excuse she suggested was, that she could not help it; but that, as he said, was quite out of the question, because they were sitting together on the sofa, and he was taking indecent liberties with her. He went out of the house to reflect upon what he should do, and then went back and told her he would not live with her again. It is not necessary for the Court to go so far as to say, that he would have been justified in turning her out of the house, if they had been living together, in consequence of such an act, or that he could have resisted an action for a debt that she had contracted, or have made a good answer to a suit for restitution of conjugal rights. It is a discretionary power that is given to the Court, and we think that when a wife has been guilty of such misconduct, we cannot say that her husband, in withdrawing from her, has wilfully separated from her without excuse so as to call upon us to exercise our discretion by refusing to dissolve the marriage, after it has

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been clearly proved that she has been guilty of adultery. We think, therefore, that we ought not, on the ground suggested, to exercise our discretion against the petitioner, and we decree a dissolution of the marriage.

Marriage dissolved.

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YOUNG and Another *v.* FERRIE and Others.

(BEFORE SIR CRESSWELL CRESSWELL.)

YOUNG and Another *v.* FERRIE and Others.

Probate Act 20 *and* 21 *Vic. c.* 77, *ss.* 61 *and* 63.—*Heir-at-Law.—Caveat.—Declaration.—Costs.*

An heir-at-law who has not been cited cannot by entering a caveat prevent the executors of a will affecting realty from obtaining probate in common form. If the heir-at-law has entered a caveat under those circumstances it is not necessary for the executors to declare.

The plaintiffs were the executors of the late Miss Elgar, and they were proceeding to prove her will in common form when a caveat was entered by the heir-at-law, although he had not been cited. The executors thereupon filed a declaration, but the heir-at-law did not plead.

Honeyman, for the executors, now moved for probate, and that the heir-at-law might be condemned in costs.

Hannen, for the heir-at-law, opposed the motion as to costs. The heir-at-law had done nothing beyond putting the executors to prove the will, and he had a right to do so, as it affected the real estate.

SIR C. CRESSWELL: The heir-at-law had no right to intervene without being cited, because the executors were proceeding to prove in common form, not in solemn form, and the probate would not have affected him as he had not been cited (20 and 21 Vict. c. 77, ss. 61 and 63). But it was unnecessary for the executors to declare, because they knew from the appearance entered, that it was the caveat of the heir-at-law, and they

might have proceeded to obtain probate. I cannot therefore condemn the heir-at-law in the costs of the declaration. Probate will be granted upon the proper affidavits as to the due execution being brought into the registry. There will be no order as to costs.

PROBATE. Nov. 23, 1859.

YOUNG and Another *v.* FERRIS and Others.

(BEFORE THE FULL COURT—CRESSWELL, J.O., WIGHTMAN, J., AND BYLES, J.)

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LLOYD *v.* LLOYD and CHICHESTER.

LLOYD *v.* LLOYD and CHICHESTER.

Dissolution of Marriage.—Collusion.—Rejection of Petition.

A petitioner having proved his marriage and his wife's adultery, and closed his case, the Court called certain witnesses, from whose evidence it appeared that the petitioner had refused to take any step towards instituting the suit until the respondent's father had secured to him a certain sum of money, as an equivalent for a contingent interest in his wife's property, given him by the marriage settlements; that an agent of the petitioner, who served the citation upon the respondent and the co-respondent, and advanced money to the co-respondent, which money had been supplied by the respondent's father, and that the respondent's father had given the petitioner £10 when the petition was signed. The Court was of opinion that there was gross and palpable evidence of collusion, and therefore dismissed the petition.

A witness, adverse to the petitioner, having been examined by the Court, the counsel for the petitioner was allowed to cross-examine him.

Affirmative evidence of collusion having been given, the Court declined to examine the petitioner, who was tendered for the purpose of explaining it.

The petitioner, Thomas Lloyd, prayed that his marriage with Annie Cowper Lloyd might be dissolved, on the ground of her adultery with George Augustus Hamilton Chichester. The respondent and the co-respondent did not appear.

It was proved in support of the petition, that the marriage took place at St. James's, Paddington, on the 1st January, 1853, the petitioner being a captain in the militia, and the son of Mr. Eyre Lloyd, a gentleman of property in Ireland; and the respondent, who was then under age, being the daughter of Mr. Cheese, a gentleman of property living at Kingston, in Herefordshire; that Mr. and Mrs. Lloyd cohabited at different places in England and Ireland, and had two children; that it 1856

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Captain Lloyd got into difficulties, and was imprisoned in the Queen's Bench for debt; that Mrs. Lloyd, during his imprisonment, formed an adulterous connection with Mr. Chichester; that Captain Lloyd discovered it, and refused to return to cohabitation on his release from prison a few months afterwards; and that, in January, 1859, Mrs. Lloyd was living with Mr. Chichester at Paris, where they were served with the citation in this suit. In 1857 and 1858 Captain Lloyd was again a prisoner in the Queen's Bench.

Mrs. Morgan, who had been in the service of Mr. Cheese, then in that of Mrs. Lloyd after her marriage, and was now again in Mr. Cheese's family, was one of the witnesses who proved the adultery and the cohabitation of the respondent and co-respondent at Paris. Mrs. Lloyd, she said, was there delivered of a child last January, of which Mr. Chichester was the father. In March she went with Mrs. Lloyd to Brighton. She had not seen Mr. Chichester there.

In answer to questions put by the Court, she said that in January last she was living with Mr. and Mrs. Cheese, and she received a letter from Mrs. Lloyd asking her to go to Paris. She had seen a person named Isaacson in London. He had been to Paris.

At the close of the petitioner's case,

CRESSWELL, J. O., asked whether Mr. Isaacson was in Court.

H. James, for the petitioner, said that he was.

Isaacson was then sworn and examined by the Court. He said, I am an agent, and have been employed in the matter of this petition. I went to Paris in December, 1858, to serve the citation on the respondent and co-respondent. I had previously communicated with Captain Lloyd about the suit, but I do not know that he instituted it at the instance of Mr. Cheese. I saw Captain Lloyd about it in September or October, 1858. I became acquainted with him from being a prisoner in the Queen's Bench when he was there. I served the citation on the 10th January. Mr. Cheese did not undertake to pay the expenses of the suit—nothing of the kind. I had an interview with Mr. Cheese at the Great Western Hotel in October, 1858. No one requested me to go. I went to point out the misery

the two young people would suffer if they continued to live apart without a prospect of reconcilement. I then knew that Mrs. Lloyd was living with Mr. Chichester. I did not consult Captain Lloyd before going, but I was anxious that he should live with his wife again as a matter of feeling. I never heard that Captain Lloyd stipulated with Mr. Cheese to have a certain sum of money for signing the petition. I was selected by Captain Lloyd to serve the citation, because I had known Mr. Chichester intimately for many years. I stayed in Paris nearly three weeks, but I did not find Mr. Chichester and Mrs. Lloyd till five or six days after my arrival. I had been requested by Captain Lloyd and his solicitor to collect all the evidence I could. I dined with Mr. Chichester and Mrs. Lloyd almost every day. On some days we dined together at a restaurant, and then I paid the bill, and on other days at their lodgings, when Mr. Chichester paid. I agreed to advance him £50 upon Mrs. Lloyd's order on her father. Mr. Cheese allowed Mrs. Lloyd so much a month, and Mr. Chichester wanted an advance upon that allowance. I had £25 of the £50, and he had the other £25. He let me have £25 out of kindness. My charge for the journey to Paris to serve the citation and collect evidence was £110. Mr. Chichester was aware of the evidence I had collected, for he knew I had seen him in bed with Mrs. Lloyd. He said there was another case against him in this Court, and he hoped this would not come on first. I advanced the money to Mr. Chichester to enable him to go from Dieppe to Paris for the purpose of completing the chain of evidence, but I did not advance it by the direction of Mr. Cheese and Mr. Cook.

CRESSWELL, J.O., asked if Mr. Strutt was in attendance?

H. James: He has acted hostilely to the petitioner. He is not our witness.

CRESSWELL, J.O.: He was your attorney.

H. James: But he has been dismissed, and has sent in a bill which has been taxed.

[The items in this bill having been brought under the notice of the Court appeared to have given rise to the inquiry as to the circumstances under which the suit was instituted.]

DIVORCE AND MATRIMONIAL. Nov. 25 & 26.

CRESSWELL, J.O.: I will adjourn the case, in order that Mr. Strutt may attend.

LLOYD v. LLOYD and CHICHESTER.

November 26.—Mr. John Strutt was sworn and examined by the Court. He said, I am an attorney, and was employed by Captain Lloyd in this suit. I saw him about it in November, 1858, when he was a prisoner in the Queen's Bench. I would not go on with his affairs after a certain period, and another attorney, Mr. Jones, was then appointed. This bill of costs (handed to the witness by the Court) was sent in by me to Captain Lloyd, and was taxed on the change of attorneys. It contains a true statement, to the best of my belief, of the matters put down in it. Early in November, 1858, I learnt from Captain Lloyd the mode in which he proposed to find money for the suit. A sum of £400 or £500 was coming to him from Mr. Cheese, and he was to be at liberty to appropriate a portion of that sum to the expenses of the suit, and the rest to settling with some of his creditors in order to get out of prison, and to his own private purposes. I saw Mr. Cheese once or twice, and tried to arrange with him for the payment of that sum to Captain Lloyd. Mr. Cheese had nothing to do with the application of the money beyond knowing that part of it was to be applied to the payment of these costs. No arrangement whatever was made or proposed with reference to claiming costs or damages from Mr. Chichester; but the understanding on which the suit was instituted was, that no costs or damages should be claimed from him. That was understood by Captain Lloyd and by all the parties. Mr. Cheese and Captain Lloyd had appointed a mutual friend, a gentleman at the bar, Mr. Cooke, to consult with me upon all matters connected with the suit and with the settlements. The suggestion as to not claiming costs and damages was made in the course of our discussions, and no doubt I communicated it to Captain Lloyd. He put himself entirely in my hands, but he was always most violent against Mrs. Lloyd and Mr. Chichester. Captain Lloyd swore positively that he would do nothing, one way or the other, either as to this suit or as to the settlements, unless Mr. Cheese first paid over the value of his contingent interest under those settlements. He said he believed he should not get the money otherwise, he and Cheese being at enmity. There were two settlements executed at the time of the marriage, one

of Mrs. Lloyd's property, and another of Mr. Eyre Lloyd's Irish property. Captain Lloyd's contingent interests under these settlements had been assigned to his father some years before, in consequence of his intending to take the benefit of the Insolvent Act. It was the value of these contingent interests that Captain Lloyd wished to receive from Mr. Cheese before instituting the suit. He and Mr. Cheese had a desperate quarrel. He thought he ought to have £600 or £700, and Mr. Cheese offered only £400. Mr. Cheese was anxious for a divorce, both on account of the settlements, and on account of the children. It is quite true, as stated in the bill of costs, that Captain Lloyd refused to be a party in any way to the divorce unless Mr. Cheese would agree to pay him money from time to time for his private purposes, and also for the expenses of carrying on the suit and of getting up the evidence, and I communicated his refusal to Mr. Cheese. Mr. Cheese agreed to hand £10 over to Captain Lloyd for his immediate use. He also said that Mr. Cook, his friend and adviser, should receive his instructions to supply the necessary funds to get up the evidence, and I communicated that to Captain Lloyd. When the petition was signed some time after, Captain Lloyd received £10. That sum and the money he afterwards received through Cooke was part of the sum which he was to have for his contingent interests. The item in the bill of costs, "Nov. 25.—Cash paid to you on signing the petition, being the amount agreed by Mr. Cheese to be paid you upon your so doing," is correct. The £10 came from Mr. Cheese himself, and I afterwards received a further sum, about £50, from him through Mr. Cooke. No doubt Mr. Cheese had expressed a wish that Isaacson should go to Paris to serve the citation, and I told Captain Lloyd so. I gave Isaacson his instructions, and supplied him with about £50, which I received from Mr. Cooke. Captain Lloyd had no money.

H. James asked for leave to cross-examine the witness.

CRESSWELL, J.O.: I think it is reasonable that you should.

Mr. Strutt stated in cross-examination, that he had known Isaacson for several years, and Isaacson had introduced clients to him, and sometimes assisted him in his business, but had

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never received any payment for so doing. The bill of costs which had been taxed was made out in Isaacson's handwriting. The bill was not made out until he had been informed that his services would not be required any longer. Captain Lloyd had some words with him, and he said he would not go on any longer unless he was paid, whereupon Mr. Eyre Lloyd's agent directed him to have his bill made out. The total of the bill was £216, but under all the circumstances of the case he offered to take £150. Almost every item in the bill was objected to by Captain Lloyd's present attorney. No doubt he had told Mr. Cheese when he consented to advance the £10 that Captain Lloyd was starving.

H. James tendered Captain Lloyd, Mr. Cook, and Mr. Cheese as witnesses in contradiction of Mr. Strutt.

CRESSWELL, J.O.: I do not see how Captain Lloyd can be examined.

Mr. W. H. Cooke, a barrister, was then then sworn, and made a statement to the following effect:—Mr. Cheese never approved of his daughter's marriage, and refused to receive Captain Lloyd. Being a friend of both the families, I was requested by Mr. Eyre Lloyd, after the young people had separated, to make arrangements for a permanent separation, and a mutual release of claims upon the family property under the settlements. In Nov. 1858, I saw Captain Lloyd in the Queen's Bench. He was in ill health, and in great poverty, and he told me that Mrs. Lloyd was living with Mr. Chichester at Paris. I wrote and asked Mr. Cheese, who up to that time had believed his daughter to be innocent, to come to London, and I acquainted him with the fact. No doubt I told Captain Lloyd that I had written to Mr. Cheese. When I saw Mr. Cheese, I expressed an opinion that he ought no longer to resist a divorce, and that if he allowed his servants, Morgan and others, to tell what they knew, there would be a facility in getting evidence. He said he would act upon my advice. and not put Captain Lloyd to expense by opposing the petition. I then entered on the subject of the purchase of Captain Lloyd's residuary interest in Mrs. Lloyd's property, for which he asked £600. It was after this that Isaacson visited Mr. Cheese, and

Mr. Cheese told me, that Mr. Strutt was authorised by Mr. Eyre Lloyd to settle Captain Lloyd's affair. Captain Lloyd wanted an advance of money from Mr. Cheese, but Mr. Cheese refused to advance a single shilling, and was very positive. I expressed an opinion that a suit in this Court ought not to cost above £50. I said, I hoped the citation would not be served upon Mrs. Lloyd in an offensive manner, and I acquiesced in Mr. Strutt's suggestion, that Isaacson should go to Paris, as he would be able to identify the co-respondent. Mr. Strutt told Mr. Cheese, that Captain Lloyd was in great distress, and asked for some money for him. Mr. Cheese refused to give any, and I interfered and said he had been severely punished, and I thought Mr. Cheese ought to give him £10. Mr. Cheese then gave the cheque, but not with any condition attached to it, to my knowledge. In December Mr. Strutt informed me that Isaacson could not go to Paris without money, and I advanced him £50, which Mr. Cheese afterwards repaid me. When Isaacson came back in January, he told me that his journey had cost £150. That rather astonished me. I had an interview with Mr. Strutt on the subject of Isaacson's demand, and in consequence of what then passed I wrote to Mr. Eyre Lloyd. That gentleman and his solicitor, came over from Ireland, and I then ascertained that Mr. Strutt had no authority from the family to act. Mr. Eyre Lloyd was very anxious for the divorce. They then turned off Mr. Strutt and appointed Mr. Jones attorney for the petitioner.

CRESSWELL, J.O.: Was Captain Lloyd's contingent interest under the settlements of such a character, that if his marriage was dissolved, the contingency would never arise?

Mr. W. H. Cooke: I did not go minutely into the settlements, so that I cannot answer the question.

H. James: requested their Lordships to examine the petitioner.

CRESSWELL, J.O.: I do not think he can be examined.

H. James: I do not propose to offer any further evidence. Mr. Cheese is here if your Lordships wish to examine him.

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CRESSWELL, J.O.: You may call him if you please, but the Court does not require that he should be examined.

LLOYD v. LLOYD and CHICHESTER.

CRESSWELL, J. O.: delivered Judgment:—The Court is of opinion, that there is no doubt at all of the fact, that adultery has been committed by the respondent and the co-respondent. But this is a case in which the Court has endeavoured to give effect to the 29th Sect. of the Act, which is in these terms:—"Upon any such petition for the dissolution of a marriage, it shall be the duty of the Court to satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to, or conniving at the adultery, or has condoned the same, and shall also inquire into any counter-charge which may be made against the petitioner."

Now the Court does not find that the petitioner has been accessory to or conniving at the adultery. But then the 30th Sect. says,—"In case the Court, on the evidence in relation to any such petition, shall not be satisfied that the alleged adultery has been committed, or shall find that the petitioner has during the marriage been accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then and in any of the said cases, the Court shall dismiss the said petition."

This case certainly presented some very curious features after the examination of Isaacson yesterday. We felt it our duty to call upon Isaacson to give an account of his share in the transaction, and I think there never was a more singular story than the one he told. He said he was employed by Lloyd to serve the citation upon Mrs. Lloyd and Chichester, because he was an intimate friend of Chichester, and that having gone to Paris in order to serve the citation and to get up evidence, he being for that purpose the agent of Lloyd, he communicated familiarly and intimately with Chichester and Mrs. Lloyd, during his stay; on some days inviting them to dine with them at restaurants, and on other days dining with them at their lodgings. On such intimate and familiar terms did they all live together, that he once had the opportunity of seeing Chichester and Mrs.

Lloyd in bed with each other; whether the opportunity was made for him or not, it is needless to inquire. That was not all. He was asked, Whether he had not advanced money to Chichester for certain purposes? At first he left in doubt for what purposes the money was advanced, and said—"Mrs. Lloyd drew a cheque for £50, and I advanced that sum to Chichester." But how? "Why I gave him £25, and he gave me the other £25." So that Chichester actually paid Lloyd's agent £25 for his trouble in going to Paris. I asked him, Whether he did not advance the money to Chichester to enable him to complete the chain of evidence? He could not deny it. Lloyd might have been able to satisfy the Court that he had nothing to do with that transaction, and that his agent acted without his authority, but upon the evidence as it stands, it can hardly be contended that the case does not come within that rule which the House of Lords applied to cases where the adulteress and the adulterer were found actively engaged in procuring evidence to support the bill of divorce, and taking money for that purpose. Then, as was affirmed by Strutt in the bill of costs, and not denied by Cooke, there was a conversation between Cooke and Cheese, in which Cheese expressed himself anxious that the petition should be proceeded with, and the result of that conversation being communicated to Lloyd, he protested that he would take no step in the matter until he got the value of the residuary interest, the reason he gave being that he could not trust Cheese. Whether that residuary interest would necessarily have been lost to him upon a divorce taking place, the Court does not know, but he fancied that it would, and insisted upon having the money down and in his own pocket, lest it should be lost if he succeeded in obtaining a divorce, and thus it comes to the same thing. Again, did he or did he not bargain to receive £10 for his immediate use when he signed the petition? No one can doubt the fact. The conversation between Cooke and Cheese was also communicated to him, in which Cooke said, "Really, you know, you should let them have such and such evidence to support their petition," and advised Cheese to put them in possession of evidence that he knew to be in existence. Without pursuing the minute details of the evidence any farther, I will advert to a case which seems to me to be exactly in point, reported in Mr. Macqueen's valuable book upon the

"Practice of the House of Lords in Divorce Cases," p. 582. It is the case of *Chisim*, and was decided in 1779. "The solicitor for the petitioner was called in, and being sworn, produced and proved an office copy of the judgment of the Court of Common Pleas against Mr. William Greaves, for criminal conversation with Mrs. Chisim. Being asked, What Mr. Chisim and Mr. Greaves were? he said, Mr. Chisim was a drysalter, and Mr. Greaves a man of property. Being asked, If he had received the costs of the suit in the Common Pleas? he said, He had not, nor taken out execution. Being asked, If he thought the plaintiff meant to take out an execution? he answered, If the plaintiff were not paid, he thought he would. Being asked, Why the plaintiff had not demanded them before? he answered, That he believed it was owing to his (witness's) delay in taxing his costs." There is no evidence to controvert in any way the fact that in this case there was an arrangement between the parties, that neither costs nor damages were to be demanded against Chichester. "Being asked, Who was to pay him his bill and all expenses? he said, A near relative of Mrs. Chisim's, whose name was Roberts. That the said Mr. Roberts was nearly related to Mr. Chisim, and lived upon his fortune at Boarshall, in Sussex. Being asked, What relation the said Mr. Roberts was to Mrs. Chisim? said, He was *her father*. Then the witness was asked, If any defence was made by Mrs. Chisim in the Ecclesiastical Court? He answered, That counsel attended for both parties, but witnesses were produced on the part of *Mr. Chisim only*. The adultery was clearly proved; but the appearances of collusion were too gross and palpable to admit of being overlooked or explained. On a subsequent day it was moved that the bill be rejected: ordered accordingly." Acting upon the same principle, we say that the evidence of collusion in this case is too gross and palpable for any Court to overlook it, and we feel bound to dismiss the petition.

Petition dismissed.

(BEFORE CRESSWELL, J. O.)

YELVERTON *v.* YELVERTON.

Restitution of Conjugal Rights.—Domicil to found Jurisdiction. —Separate Domicil of Husband and Wife.

A person with a foreign domicil of origin may acquire an English domicil for the purpose of founding the jurisdiction of the Matrimonial Court, without acquiring such a domicil for the purpose of succession.

An English domicil for the purpose of founding the jurisdiction of the Matrimonial Court, is not acquired by a person who has made a temporary sojourn in England, but who has never resided in England, and is out of the territory when the suit is instituted.

An officer in the English army, who had a foreign domicil of origin, who had never permanently resided in England, and who was not in England when the suit was instituted, but who had received a military education at Woolwich, and held a commission in a regiment, the permanent head-quarters of which were in England, was held not to have acquired an English domicil.

The domicil of the husband is that of the wife, and she cannot acquire a separate domicil, even when he has been guilty of such misconduct as would furnish her with an answer to a suit for restitution of conjugal rights.

The petitioner, Marie Theresa Yelverton, of Maida Hill, in the county of Middlesex, filed a petition on the 6th May, 1859, against William Charles Yelverton for a restitution of conjugal rights. She alleged (1.) that on or about the 13th April, 1857, she was lawfully married under her then name of Marie Theresa Longworth, spinster, to William Charles Yelverton, then and now a Major in Her Majesty's Royal Regiment of Artillery, at Edinburgh, in the kingdom of Scotland; (2.) That the aforesaid marriage was a good and valid marriage according to the law of Scotland; (3.) That she was afterwards, on or about the 15th August, 1857, lawfully married to the said William Charles Yelverton at Killowen, in the kingdom of Ireland, according to the rites of the Roman Catholic Church; (4.) That the aforesaid marriage was a good and valid marriage according to the law of

Ireland; (5.) That she subsequently lived and cohabited with her said husband at divers places; and, amongst others, in Ireland, at Edinburgh, at Hull, and in France, until April, 1858, and that there has been no issue of such marriage; (6.) That the said William Charles Yelverton has ever since June, 1858, without any just cause, refused, and still refuses, both to permit her to live or cohabit with him, and also to render her conjugal rights.

The citation was addressed to William Charles Yelverton, of Woolwich, in the county of Kent, and was served on the respondent, with a copy of the petition, on the 12th May, 1859, at Edinburgh.

The respondent entered an appearance to the citation under protest; and, on the 15th June, 1859, obtained leave from the Judge Ordinary to plead to the jurisdiction of the Court. On the 21st June, 1859, he pleaded that he was at the time of the commencement of the suit, and still is, a Major in the British Army, and a Captain in Her Majesty's Royal Artillery, stationed at Leith Fort, in Edinburgh, in the kingdom of Scotland; and that he was at the time of the commencement of the suit, and has since continued to be, and still is, resident at Edinburgh, aforesaid, on military service as such officer in the British army as aforesaid: and that his domicil of origin is in the kingdom of Ireland; and he has never abandoned such domicil, or acquired any domicil elsewhere. In the affidavit verifying this plea, the respondent stated that he had been resident at Edinburgh on military service for two years and upwards prior to the commencement of the suit.

A replication, filed by the petitioner on the 6th July, 1859, stated that before and at the time of the commencement of the suit, the petitioner and respondent were respectively subjects of Our Lady the Queen; and the respondent was, and still is, on full pay of Her Majesty's Royal Regiment of Artillery, the headquarters of which were and are at Woolwich, in the county of Kent, and within the jurisdiction of the Court; and by reason thereof, the said respondent, at the time of the commencement of this suit was, and still is, domiciled at Woolwich aforesaid, and within the jurisdiction of the Court.

On the 30th July, the cause came on for hearing; but after the argument of counsel for respondent, counsel for the petitioner applied for leave to amend the replication.

The Court granted leave to amend within eight days on payment of the costs of the day.

On the 8th August, the petitioner filed an amended replication, stating (1.) That before and at the time of the commencement of this suit, the petitioner and the respondent were respectively subjects of Our Lady the Queen; (2.) That in February, 1840, the respondent, being then of the age of fourteen years, left the house of his father at Belleisle, near Portumna, in the county of Galway, in Ireland, where he was then residing, and came to England, and entered the Royal Academy at Woolwich, in the county of Kent, as a cadet, and there continued until the 11th of January, 1843, when he obtained a commission as Lieutenant in Her Majesty's Royal Regiment of Artillery; (3.) That the respondent has thenceforth continued on full pay of the said Royal Regiment of Artillery, the head-quarters of which, before and at the time of the commencement of this suit, were at Woolwich aforesaid, within the jurisdiction of the Court; (4.) That when the respondent left Ireland, as aforesaid, he did so with the intention of not returning thither, and that he has not since resided in Ireland except for the purpose of visiting his father at Belleisle aforesaid, and except on the occasion mentioned in the third paragraph of the petition, when he went thither for the sole purpose of being there married to the petitioner; (5.) That the respondent is not, and never was, seised or possessed of any house or land, or any property whatsoever situate in Ireland; (6.) That the respondent, on the 8th June, 1859, in the Court of Session in Scotland, instituted against the petitioner a suit declaratory of marriage and putting to silence; (7.) And that at the time of the commencement of the said suit he alleged that he was domiciled in Scotland.

For a second replication, the petitioner stated, (8.) That after the marriage at Edinburgh, and after the marriage in Ireland, she and the respondent lived and cohabited together as man and wife in Ireland, at Edinburgh, at Hull, in England, and at Bordeaux in the empire of France; (9.) That in April, 1858, the respondent deserted her at Bordeaux aforesaid, and went to Edinburgh; (10.) That the respondent has always since refused to live and cohabit with her as his wife, though requested by her so to do, and has thenceforth continued to live separate and apart from her; (11.) That on the 26th of June, 1858, the

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respondent, at Trinity Chapel, North Leith, in the kingdom of Scotland, did unlawfully, but in fact, marry Emily Marianne Forbes, a widow, with whom he has thenceforth lived and cohabited at Edinburgh, and by whom he has had issue; (12.) And she further said, that at the time of the commencement of this suit she was, and still is domiciled within the jurisdiction of this Court, and at Maida Hill, in the county of Middlesex.

A statement by way of rejoinder to this amended replication was filed on the 20th September, 1859, in which the respondent said,—(1.) With reference to the second paragraph of the said replication, that between February, 1840, and the 11th January, 1843, he was frequently at his father's residence at Belleisle, in the county of Tipperary, in Ireland; and he went there whenever an opportunity offered itself, as it did during the times of vacation in summer and winter of each year, for the period of seven weeks each, or thereabouts; (2.) With reference to the third paragraph, that after obtaining his commission he became and continued down to the commencement of the present suit, the officer in command of the 1st Company of the 9th Battalion of Her Majesty's Royal Artillery, and for two years and upwards prior to such commencement, he was with the said company stationed at Leith near Edinburgh, in Scotland; that a General Order of His Royal Highness the General-Commanding-in-Chief, relating to the Royal Artillery, dated the 1st of April, 1859, after stating that Her Majesty's Government, on the recommendation of His Royal Highness, had decided that the head-quarters of the Royal Artillery should remain as theretofore, at Woolwich, but that the staff of the battalions should be distributed to the several districts and garrisons at home and abroad; for that purpose directed, amongst other things, that the then terms "battalion," &c., should be superseded by those of "brigade" and "battery," and the regimental staff of the then existing battalions should form brigades, bearing corresponding numbers, and be distributed as therein mentioned; and then proceeded to allot the head-quarters of each of the fifteen brigades of the Royal Artillery, and fixed the head-quarters of the 9th Brigade, Field Artillery, at Ballincollig, in Ireland; that in pursuance of the said General Order the said company of the 9th Battalion of Royal Artillery has become the 7th Battery of the said 9th Brigade of Field Artillery; and since the said

change was effected the said William Charles Yelverton has been, and is now, the commanding officer of the said 7th Battery; that the head-quarters of the 9th Brigade, which by the said General Order were directed to be at Ballincollig, were, by a subsequent General Order, dated the 17th May, 1859, transferred to Dublin, where they now are; (3.) With reference to the fourth paragraph, that he denied it to be true that when he left Ireland he did so with the intention of not returning thither; for on the contrary, he left it with the intention of preparing himself for entering into Her Majesty's service, and subject to the orders he should receive as to his being stationed at other places, he intended to retain the domicil and abode of his father; and that besides spending his vacations while at Woolwich as before mentioned, he obtained several periods of leave of absence from his company, and on each of these occasions resorted to his father's residence in Ireland, and remained there until the term of his leave expired; (4.) With reference to the fifth paragraph, that subject to the prior life estates of his father, Viscount Avonmore, and his elder brother, the Hon. G. F. W. Yelverton, and the estate in tail male, limited to the sons of such brother, the family mansion and estates of Belleisle and Dennyisland, in the county of Tipperary, and the family estates in the county of Mayo, in Ireland, are settled upon him for life, with remainder to his first and other sons in tail male; and the said Hon. G. F. W. Yelverton was married in 1855 to his present wife, and has had no issue; and that the respondent is not, and never was possessed of any lands or houses or of any interest in any lands or houses, nor has he any property of any description situated in England; (5.) With reference to the sixth paragraph, that the suit which he instituted in the Court of Session in Scotland against the petitioner was in the nature of a suit of jactitation of marriage, and the summons therein concluded or prayed that it should be declared that the said William Charles Yelverton was free of any marriage with the petitioner, and that she ought to be put to perpetual silence thereanent in all times coming; that previous to this suit having been commenced, that is to say, on the 7th August, 1858, the petitioner instituted a suit in the said Court of Session against him, the summons in which concluded or prayed that it should be declared that the

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petitioner and he were lawfully married persons, and that this last mentioned suit continued to be, and at the time when he instituted his said suit on the 8th June, 1859, was in dependence.

Nov. 5.—*James Anderson*, Q.C. (*W. A. Clark* with him), for the respondent.

The question is, whether the facts alleged in the pleadings establish that the respondent has an English domicil sufficient to give the Court jurisdiction. The respondent's domicil of origin is Ireland, the place where the marriage was celebrated, the *locus contractus*, is Scotland, and his actual place of residence is Scotland. He never had a permanent residence in England, and never possessed any property, real or personal, in England. It may be a question whether his domicil is in Ireland or in Scotland, but it certainly cannot be in England. The Divorce Act (20 & 21 Vict. c. 85, s. 6), vests in the Court the same jurisdiction as to suits for restitution of conjugal rights that was formerly exercised by the Ecclesiastical Courts, it cannot therefore extend its jurisdiction so as to include persons domiciled out of the kingdom.

CRESSWELL, J.O.: Suppose the marriage had been in England?

Anderson: That would have made no difference. The fact that England was the *locus contractus* would not of itself found the jurisdiction of the English Court. A Matrimonial Court proceeds *in personam*, and it has no power over persons not resident within the territory. (Shelford on Marriage and Divorce, 486) (*a*).

CRESSWELL, J.O.: The Court is expressly empowered to serve process out of its jurisdiction (20 & 21 Vict. c. 85, s. 42).

(*a*) "In matrimonial causes the power of the Court is *in personam*, and depends on the locality of the person cited. Although a defendant may usually reside out of the kingdom, yet if he is served with a citation within the jurisdiction of an Ecclesiastical Court in England, as that of the Consistory Court of London, in a suit for nullity of marriage, that Court has jurisdiction to try the validity of the marriage wherever it may have been contracted.—(*Morse* v. *Morse*, 2 Hagg. Ecc. 610; *Donegal* v. *Donegal*, 3 Phill. 599; *Harford* v. *Morris*, 2 Hagg. Const. 425)."

Anderson: That is for the purpose of bringing before the Court parties who, though resident out of the jurisdiction, may have an interest in a suit that is pending. The service of the citation does not give jurisdiction, it assumes that jurisdiction exists. The jurisdiction over a co-respondent residing out of the territory is ancillary to the jurisdiction over the principal parties to the suit. It was not competent to the Ecclesiastical Courts to compel persons out of their jurisdiction to answer to a citation. If on the face of a citation it appeared that the party on whom it was served was resident out of the territory, proceedings founded on such citation might be reversed. (*Donegal* v. *Donegal*, 3 Phill. 599; *Bruce* v. *Bruce*, 7 Bro. P. C. 566; case of *Sir Charles Douglas*, 5 Vesey, 757; *Kennedy* v. *Cassilis*, 2 Swanston, 313; Story's Conflict of Laws, c. 14, s. 539.) The only fact upon which an argument in favour of the jurisdiction can be founded is, that the head-quarters of the Royal Artillery are at Woolwich. But a person entering the British army retains his domicil of origin. His taking service under the Crown does not give him an English domicil. (Phillimore on Domicil.)

CRESSWELL, J.O.: He retains the domicil with which he enlisted. If he has acquired a domicil, his enlistment will not send him back to his domicil of origin.

Anderson: In the *Earl of Dalhousie* v. *M'Dowall* (7 Cl. & Fin. 817), the House of Lords acted on the principle, that to acquire a domicil there must be actual residence in a place, and that it must be the principal and permanent residence. To the same effect is *Brown* v. *Smith* (15 Beav. 444.) There is not even a constructive domicil in England, but even if there were it is not a necessary consequence that the Court has jurisdiction. If the Court were to make a decree against the respondent, it has no means of enforcing it. (*Morse* v. *Morse*, 2 Hagg. Ec. 610. *Barlee* v. *Barlee*, 1 Add. 305.)

The second part of the replication consists of allegations from which the Court is asked to infer that the petitioner has a domicil separate from that of the respondent. But a wife cannot acquire a separate domicil even with the husband's

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consent; and in *Dolphin* v. *Robins* (4 Jurist, 268) (*a*), not so strong a case as the present, the House of Lords held that nothing short of a judicial separation, or a divorce *a mensâ et thoro*, would enable a wife to acquire a separate domicil. If she is able to establish her case, she has no English domicil, and if she is unable to establish her case, she has no *locus standi*, for she is not married. The Scotch Court to which she first resorted is the proper tribunal to determine the question of the validity of the marriage.

Dr. Phillimore, Q.C. (*Honeyman* with him), for the petitioner: There is a great distinction between domicil to found jurisdiction, and domicil to support a testament. (*Croker* v. *The Marquis of Hertford*, 4 Moore, P. C. C. 366.) The law of doimcil is not applied to contracts and to wills in the same manner. A man may have many domicils at the same time. A temporary residence in a territory is sufficient to found jurisdiction, although it will not cause a domicil to be acquired for all purposes.

CRESSWELL, J.O.: Your argument is that a man residing in this country is amenable to its laws, although his succession is regulated by the law of his domicil.

Dr. Phillimore: A person in the petitioner's position has no means of obtaining a declaration of marriage except a suit of this nature, and, being a suit to establish a marriage, it has always been favoured by the Ecclesiastical Courts. (*Herbert* v. *Herbert*, 2 Phill. 448, and 2 Hagg. Const. 263; *Moore* v. *Moore*, 3 Moore, P. C. C. 86.)

In considering the question of domicil, it must be taken that the respondent, although an Irishman, is a British subject; that when a minor he entered the army in England, and has since been in active service in a regiment, the head-quarters of which are at Woolwich; and that he has at present neither house nor land in Ireland. His plea that he never abandoned his domicil of origin is inconsistent with his allegation that he is domiciled in Scotland. But for the purpose of this suit his legal domicil is at Woolwich. Even if his domicil is in Scotland

(*a*) 29 L. J. P. & M. 11.

or Ireland, his conduct has been such as to give his wife a right to resort to this Court. She is domiciled as far as she can be in England, and for the purpose of maintaining this suit she is to be considersd a *feme sole.* (*Warrender* v. *Warrender*, 2 Cl. & Fin. 488; *Whitcomb* v. *Whitcomb*, 2 Cur. 352; *Collett* v. *Collett*, 3 Curt. 726, and 2 Notes of Cases 5; *Donegal* v. *Donegal*, 3 Phill. 586; *Morse* v. *Morse*, 2 Hagg. Ec. 610. Where the wife is proceeded against by the husband he has a right to assume that her domicil is his, but a wife is not precluded from proceeding against a husband on the ground that his domicil is not hers. If she were, the husband would be taking advantage of his own wrong, and insisting on the theory that he was cohabiting with her in order to prevent the Court from affording her relief. (*Harteau* v. *Harteau*, 14 Pickering, American Rep. 481.)

Honeyman: This Court, being a Court of Record, has a wider jurisdiction than the old Ecclesiastical Courts. Both parties to the suit being British subjects, the Court has jurisdiction, even if they neither of them are domiciled in England. *Mostyn* v. *Fabrigas*, 1 Smith's L. C. 428, 4th edition.)

Anderson replied.

Cur. adv. vult.

Before judgment was delivered the following cases were cited by counsel:—*Tenducci's case*, decided in 1775; *Carden* v. *Carden*, 1 Curt. 551; *Dasent* v. *Dasent* (1 Roberts, 800); *A. B.* v. *C. D.* (7 Anderson's Court of Session Cases, 556).

December 7.—CRESSWELL, J.O., delivered judgment. This was a petition by Marie Theresa Yelverton praying for restitution of conjugal rights.

The material facts alleged on the pleadings were in substance as follows:—The petitioner alleged that on or about the 13th April, 1857, she was lawfully married to William Charles Yelverton, then and now a major in her Majesty's Royal Regiment of Artillery, at Edinburgh, in the kingdom of Scotland. That the marriage was valid according to the law of Scotland. That on the 15th August, 1857, the petitioner was lawfully married to the said William Charles Yelverton, in the kingdom

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of Ireland, according to the rites of the Roman Catholic Church; that the petitioner afterwards lived and cohabited with her said husband in various places in Ireland, Edinburgh, Hull, and France, until April, 1858. That ever since June, 1858, William Charles Yelverton had, without just cause, refused to allow the petitioner to live or cohabit with him.

Petition and citation were served in Edinburgh.

The respondent appeared under protest, and pleaded that he was at the commencement of the suit a major in the British army, and a captain in Her Majesty's Royal Artillery, stationed at Leith Fort, Edinburgh, in the kingdom of Scotland, and has since continued to be and still is resident at Edinburgh aforesaid, and that his domicil of origin is in the kingdom of Ireland, and he has never abandoned such domicil, or acquired any domicil elsewhere.

The petitioner replied, first, That before and at the commencement of the suit, both petitioner and respondent were subjects of the Queen. That in 1840, respondent being fourteen years of age, left his father's house in Ireland and entered the Royal Academy at Woolwich as a cadet, and continued there till 1843, when he obtained a commission. That he has thenceforth continued on full pay, and that the head-quarters of the regiment were and are at Woolwich, within the jurisdiction of this Court. That when the respondent so left Ireland, he did so with the intention of not returning thither, and that he has not since resided in Ireland, except for the purpose of visiting his father at his residence, and except when he went for the sole purpose of being married to the petitioner. That he had no land in Ireland. That on the 8th June, 1859, he instituted a suit against the petitioner in the Court of Session, and therein alleged that he was domiciled in Scotland.

The petitioner replied, secondly, That after the marriage to the respondent, they lived and cohabited together in Ireland, Edinburgh, Hull, and Bordeaux, in the empire of France. That in April, 1858, the respondent deserted her at Bordeaux, and went to Edinburgh, and has ever since refused to live and cohabit with her as his wife. That at the time of the commencement of this suit, she was and still is domiciled within the jurisdiction of this Court, to wit, at Maida Hill, in Middlesex.

The respondent rejoined, alleging that he did not leave Ireland in 1840, without any intention to return, but returned

frequently and spent his vacations at his father's house there; and after he obtained his commission, on several occasions had leave of absence from his company, and spent the time allowed him at his father's. That for two years before the commencement of this suit, he was stationed at Leith, near Edinburgh, with his company, which is now the 7th battery of the 9th Brigade. That the head-quarters of the brigade are at Dublin.

No answer to this rejoinder was brought in.

Upon the pleadings it appears that the fact of the respondent leaving Ireland without the intention to return is asserted on the one side and denied on the other, but no affidavit has been brought in by either party as to that fact, and if it were material to the determination of the real questions raised, it would be necessary that the truth or falsehood of the allegation should be first ascertained. But it seems to me quite immaterial to consider whether a boy of the age of fourteen, coming over to this country for the purpose of receiving a military education, did or did not intend to return to Ireland.

The material facts, as established then, appear to be these:— The respondent was born in Ireland of Irish parents, and when a minor received a military education in England, obtained a commission in the Royal Artillery, and was afterwards stationed at or near Edinburgh. When there he married, in Scotland, the petitioner, Marie Theresa, who is said to have been born at Chetwode in Lancashire. The parties then went to Ireland, were re-married there according to the rites of the Roman Catholic Church, returned to Scotland, cohabited as man and wife there, at Hull, and afterwards at Bordeaux, in France. In April, 1858, the respondent quitted the petitioner at Bordeaux and returned to Edinburgh, where he has remained with his company ever since, and has constantly refused again to live or to cohabit with her. The headquarters of the regiment of Artillery have always been at Woolwich. The head-quarters of the different battalions, or as they are now called, brigades of the regiment, were by general order of the 1st April, 1859, removed from Woolwich and established at various places. The head-quarters of the brigade to which the respondent has been attached, have not since that time been in England.

The petitioner has asserted in her replication that at the time of the commencement of the suit she was, and still is domiciled in England: namely, at Maida Hill, in Middlesex. No affidavit

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has been brought in to support the allegation, but it has not been denied. If, therefore, she could by law be domiciled there, it may for the purpose of this question be taken as true.

With regard to the last point of domicil, it seems to me that the petitioner, who claims to be the wife of Major Yelverton, and who does not pretend that his domicil is in England on any other ground than that the head-quarters of the regiment of Artillery are at Woolwich, cannot have acquired a domicil for herself different from his. The domicil of the husband is the domicil of the wife. And even supposing him to have been guilty of such misconduct as would furnish her with a defence to a suit by him for restitution of conjugal rights, she could not on that ground acquire another domicil for herself, as was recently held by the House of Lords in *Dolphin* v. *Robins* (*a*). I must, therefore, treat the case as if that assertion had not been made, or rather, I must ascribe to it the only meaning which is consistent with the law, namely, that she was resident at Maida Hill.

On the argument before me, a great deal of learning on the doctrine of domicil was displayed, and many cases were cited involving the consideration of it; and it was truly stated that the word domicil has many meanings according as it is used with reference to succession, or for determining rights of belligerents, or ascertaining trading privileges. The case now to be decided is certainly of much importance, and, from the scope of the argument, appeared to be involved in considerable difficulty. But upon reflection the point to be determined appears simple and easy of solution. It is unnecessary to consider the question of domicil for any of the purposes above-mentioned; for Major Yelverton may have retained his domicil of origin for many purposes, and yet may have been domiciled in England so as to give jurisdiction to this Court.

Was he domiciled in England for the purpose of founding jurisdiction?

He was not born in England. He was here for some time as a student when a minor. He afterwards passed some time (probably a very short time, for its duration is not mentioned) at Hull, he removed thence to Bordeaux, and thence to Edinburgh, where he has remained ever since. He therefore cannot

(*a*) 29 L. J. P. & M. 11.

be said to have ever dwelt or had a residence in England since he obtained his commission. And the case as to domicil must rest upon the alleged legal fiction that he is supposed to be present at the head-quarters of the regiment of Artillery in which he has a company.

No decision or dictum was cited to support that position, nor can I find any authority for it. If that ground fails, upon what other grounds can the petitioner's right to sue in this Court be sustained?

The Court was established by an Act entitled, "An Act to amend the Law relating to Divorce and Matrimonial Causes in England." It combines in itself all jurisdiction previously vested in or exerciseable by an Ecclesiastical Court or person in England in respect of divorce *a mensâ et thoro*, suits of nullity of marriage, suits for restitution of conjugal rights, &c. It is a Court for England, not for the United Kingdom, or for Great Britain; and for the purposes of this question of jurisdiction, Ireland and Scotland are to be deemed foreign countries equally with France or Spain. If this be so, this is a suit against a foreigner who is not, and was not at the commencement of the suit, within the kingdom of England, who never had any residence in England, who never owed obedience to the laws of England except during the period of his temporary sojourn here, and who is not said to have done anything in England contrary to those laws.

Story, in his "Conflict of Laws," c. 14, "On Jurisdiction and Remedies," p. 539, says:—"Considered in an international point of view," (and so I think I must consider this case) "jurisdiction, to be rightfully exercised, must be founded either upon the person being within the territory, or upon the thing being within the territory; for otherwise there can be no sovereignty exerted, upon the known maxim—*Extra territorium jus dicenti impune non paretur.* Boullenois puts this rule among his general principles: 'The laws of a sovereign rightfully extend over persons who are *domiciled* within his territory and over property which is there situate.'" Again, in *Warrender* v. *Warrender*, as reported in 9 Bligh, 144, Lord Lyndhurst say, "The first point is the question of domicil. Unless these parties were domiciled in Scotland, the Court had no jurisdiction." Unless some ground can be discovered for saying that Major Yelverton was domiciled in England according to the

law as laid down by Lord Lyndhurst, by Boullenois, and by Story, he was not subject to the jurisdiction of this Court. It was said, indeed, that jurisdiction was given by the 47th section of the Act by the authority of which the Court exists, namely—"Every such petition shall be served on the party affected thereby either within or without her Majesty's dominions in such manner as the Court shall direct." That section certainly relieves the Court from all difficulty as to serving a process on the party accused, but assumes, as I apprehend, that the party to be served is subject to the jurisdiction of the Court.

Of all the cases cited at the bar three only bear such resemblance to the present as make it necessary to notice them:—*Tenducci's case*, 1775; *Collett* v. *Collett* (3 Curt.), and *Dasent* v. *Dasent* (1 Roberts).

Tenducci's case is in many respects very remarkable. Dr. Lushington has on two occasions mentioned it as having been decided in the Arches, and therefore of great authority. (See *Collett* v. *Collett*, 3 Curt., 731; and *Dasent* v. *Dasent*, 1 Roberts, 802.) Dr. Twiss has kindly had the original papers looked up, and from them I find that the cause was in the Consistory Court. No trace of any appeal or other proceeding in the Arches can be found. The first citation issued on the 15th of January, 1774, to cite "Fernando Tenducci of the Parish of St. Martin-in-the-Fields in the county of Middlesex and our diocese of London," &c., &c., "to answer to Dorothea Kingsman, wife of W. L. Kingsman, Esq., of the Parish of St. James, Westminster, in the county of Middlesex, in a certain cause of nullity of marriage by reason of impotency," &c. This citation was returned into Court on the 20th of January with the certificate of the officer, "that on the eighteenth and twentieth of January he went to the dwelling-house of Nicoll and Miller, No. 7, corner of Suffolk-street, in the parish of Saint Martin-in-the-Fields, in the county of Middlesex, where the within-named Fernando Tenducci *usually lodged*, when in England, and which was his last known place of abode; and was there informed that the said Fernando Tenducci had *left his said lodgings about eighteen months ago*, and was gone out of the kingdom, and was supposed to be at that time residing in some part of Italy." Nothing further was done upon that citation, but on the 18th of June another citation issued against Tenducci, described

as before, to answer Dorothea Kingsman, the wife of W. L. Kingsman, formerly Maunsell, and falsely called Tenducci, in a certain cause of nullity of marriage by reason of impotency— the only difference being in the description of the party complaining. The return of the officer was as follows:—"I went three times to the Theatre Coffee House, situate in the Haymarket, in the parish of Saint Martin-in-the-Fields, county of Middlesex, and also to the dwelling-house of Messrs. Nicoll and Miller, No. 7, same street, parish, and county, which was *the last known usual place of abode of Fernando Tenducci*, as I was informed; and that I went to such places, at the beforementioned times, in order to have served him personally with this citation, but could not find him. And then I was informed, at the said Theatre Coffee House, by several persons, that the said Fernando Tenducci was at that time in Italy, as they believed, but at what particular place they could not tell. And I was also informed, at the house of Nicoll and Miller, that the said Fernando Tenducci was at Florence, and when he would return to England they knew not."

The difference in the two returns is remarkable. The first says that Fernando Tenducci usually lodged at Nicoll and Miller' *suchen in England*, and that it was his last known place of abode. The return to the second describes Nicoll and Miller's as his last known usual place of abode, and omits *when in England*. The first return proceeds to state that he has left his lodgings eighteen months ago, and gone out of England. The second, that he could not be found at Nicoll and Miller's, and was said to be *then* in Florence, and that it was not known when he would return. Now, I cannot help suspecting that the return to the first citation showed too much, and therefore the second citation was issued; the return to which merely showed that the last known usual place of abode of Tenducci was at Nicoll and Miller's, and that he was, when service was attempted, said to be at Florence, and that it was not known when he would return; from which it would be implied that he was expected to return to his usual place of abode. On the 28th of June, a decree issued for citing Fernando Tenducci, by ways and means, which was executed in the usual manner, and a copy was delivered to him personally at Naples on the 24th of September, in the same year.

A libel was given in on the 24th May, 1775, the 15th article

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of which was in these words: "Item, that the last place of residence of the said Fernando Tenducci, party in the cause, when in England, was within the parish of St. Martin-in-the-Fields, in the county of Middlesex, and diocese of London, and by reason thereof, he was, and is, subject to the jurisdiction of this Court. This was, and is, true, public, and notorious, &c." It appeared then, that the attempt to serve him was at his last known and usual place of abode; that he was in Florence when that attempt was made, and that it was not known when he would return. And the jurisdiction was pleaded in the terms just mentioned. Tenducci never appeared to gainsay any part of this, or to controvert the jurisdiction.

In *Carden* v. *Carden* (1 Curt. 558), Dr. Lushington explained the ground upon which the Ecclesiastical Court proceeded in exercising jurisdiction under these circumstances. He then says:—"There is nothing here to show that the party proceeded against ever had any residence in the diocese. If you once fix the residence before the citation issues, the Court will presume a continuance until the contrary be shown. Upon an affidavit being brought in that the party had his residence in London before the service of the citation, the Court may proceed with the cause." That may explain the reason of their proceeding in Tenducci's case as they did.

Again, in *Collett* v. *Collett* (3 Curt., 726), which is another of the cases relied on by the petitioner, it appeared that the party cited not only had a residence in London which he still retained, but that he did not quit it until after the citation issued; and the only question in that case was, whether the Court could proceed, the citation having been served personally on the party at Malines, and not by ways and means.

But there is a passage in the judgment worthy of notice, as applicable to the question of residence. The learned Judge there says: "The Court always looks on a question of jurisdiction to the statute of Henry VIII. (c. 9), which was passed in affirmation of the Common Law, and by which this Court, among others, had local limits assigned to it. That statute is the document by which this Court must be governed in these proceedings; it was passed for the purpose of preventing abuses which took place by reason of the process to appear in the Arches and other Ecclesiastical Courts being served on a party *far from and out of the dioceses* where the party cited

dwelt. (These words are of some importance)—not where the party *might happen to be at the period of issuing the citation*, but out of the diocese wherein he dwelt. No doubt the word *dwell* means a permanent dwelling. In no other part of the statute are there any words to give a different meaning to the words I have cited; and in the enactment the words are—'That no manner of person shall be cited or called to appear out of the diocese wherein he shall be *inhabiting* at the time of the awarding or going forth of the citation.' Doubtless the word 'inhabit' is here used in precisely the same sense as the word 'dwell' in the prior part of the statute. The term "inhabit" is one to which many meanings have been attached by the law, and is one which can only be construed by reference to the circumstances of each individual case." The learned Judge goes on to say,—"Looking to this case with a stricter eye, it is even more clear that Mr. Collett is within the jurisdiction. No doubt he was resident in the house in, &c., and was actually in the house at the time of the going forth of the citation on the 22nd day of September. Such being the words of the statute, what is the construction put upon them in other Courts? There is a case to be found in the book which I now hold in my hand—Burns's Ecclesiastical Law. I have had reference to the original reporter—2 Brownlow and Goldsbury, 12, and I find the case most accurately quoted. It is thus:—'8 James: An attorney in the King's Bench was sued in the Arches for a legacy, and for that he inhabited in the diocese of Peterborough, prohibition was prayed and granted; because, though he remained here in term time, he was properly inhabiting within the jurisdiction of the Bishop of Peterborough,' plainly thereby showing that in the opinion of a court of law the true construction of the statute is not the inhabiting accidentally and for a single purpose within the jurisdiction, but means a general habitation in the place in which the jurisdiction of the Ecclesiastical Court is founded."

It remains for me to notice the case of *Dasent* v. *Dasent* (1 Roberts. 800), mentioned candidly by Dr. Phillimore, after the argument took place. It approaches more nearly than any other that has been found to the present case. A citation was issued by the wife against the husband, describing him as of St. James's, Westminster. The officer

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certified that he had attended at 11, Pall Mall, in the parish of St. James's, Westminster, the last known place of residence of Mr. Dasent, for the purpose of serving the citation on him personally; that he was informed that he had left his residence, and it was not known there where he was at that time, but it was reported that he had left England and was in the West Indies. A decree by ways and means was then issued, and executed in the usual manner, and on the 21st of April, 1849, the citation was brought in, having been personally served on Mr. Dasent at Kingstown, in the island of St. Vincent, on the 5th February preceding.

The wife made affidavit as to the misconduct of her husband, showing gross ill-treatment in England, but in which, amongst other things, it was stated that in March, 1847, he left England and went to the island of St. Vincent, and had resided there ever since. Upon that affidavit, an application was made to the Court to pronounce the husband in contempt for the purpose of proceeding, in order to put upon the record proof of the cruelty and adultery. It is worth while to notice the very terms of the judgment. Here again *Tenducci's case* was quoted. The learned Judge asks Dr. Addams—"How was the jurisdiction of the Court of Arches founded in that case?" The answer is—"by letters of request." It seems to me a mistake from beginning to end. Then the learned Judge says in answer to this application, to be allowed to proceed in order to put upon record proof of the cruelty and adultery—"I think it is in furtherance of justice that I should grant the present application. I pronounce the husband in contempt, at least for the purpose of carrying on the proceedings and placing the evidence on record; but I do not go the length of saying, I will pronounce a final sentence in the cause." The proceedings were carried on throughout *in pœnam*. The libel was admitted, and afterwards witnesses were examined, and the publication passed." Then, upon being asked for a decree, the Court observed, that the only obstacle in the way was the matter of the jurisdiction, but said—"I have fully considered that question, and I think it right that I should pronounce for the divorce. I do so accordingly."

The ground upon which that very learned person held that the Court had jurisdiction is not explained. Had he stated any rule or legal principle which would have been applicable to

this case, I should certainly have held myself bound by it. But the report not throwing any such light upon the case, I can only take it as an authority where the circumstances are precisely similar, which cannot be said of the case now before the Court. Major Yelverton is not an Englishman; he never had a residence in England, nor was he ever guilty of any misconduct towards the petitioner in England. And from the passage which I have read in the report of *Carden* v. *Carden* (1 Curt.), I infer that Dr. Lushington would have held that there was no jurisdiction, unless evidence had been given of some residence in England. That foundation was laid in every case that was cited, and I cannot treat any one of them as an authority for overruling the protest of Major Yelverton.

One other point was made on behalf of the petitioner, namely, that she before, and at the time when the citation issued, was domiciled in England. I have already stated that in my opinion she could not, as a married woman, acquire a domicil recognised by the law other than that of her husband. But she may actually reside in a different country, and construing her replication as an assertion that she was living in England, I presume it was introduced for the purpose of bringing before the Court the American decision of *Harteau* v. *Harteau* (14 Pickering's American Reports), where it was held that a wife who was resident in one of the United States might sue *there* for a divorce, although her husband was resident in a different state. The subject is pretty fully discussed in Bishop on Marriage and Divorce, and the privilege there allowed to the wife appears to have been founded on principles quite inapplicable to this case, namely, that the party suing, whether husband or wife, must before the suit reside for a certain time in the state where it is instituted, and, therefore, if a wife were bound to follow her husband, to sue him where he resides, he could always defeat her suit by changing his residence before she could commence it. Another ground was, that the wife there contended that, by her husband's delinquency, she had a right to be released from the marriage tie, whereas here she is seeking to enforce it. There is nothing then in this American decision to get rid of the maxim relied on by the counsel for the respondent—*actor sequitur forum rei.* I must, therefore, sustain the protest and dismiss Major Yelverton.

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BACON *v.* BACON and BACON.

(BEFORE THE FULL COURT:—CRESSWELL, J.O.; WATSON, J., and HILL, J., AND A COMMON JURY.)

BACON *v.* BACON and BACON.

Dissolution of Marriage.—Pleadings.—Practice.

A respondent charged with adultery did not traverse that allegation, but pleaded adultery, cruelty, and wilful neglect and misconduct on the part of her husband. Upon issue joined on those pleas and the trial of the cause before a jury, the Court held that the jury could not take cognisance of the allegations in the petition which had not been traversed; that the respondent was therefore bound to begin and establish her pleas; and that after a verdict had been entered against her on those pleas, the witnesses called to establish the allegations in the petition, could not be cross-examined on her behalf.

This was a petition by Samuel Bacon for the dissolution of his marriage with Elizabeth Fanny Bacon on the ground of her adultery with Oliver Batty Bacon, the petitioner's brother. The marriage took place in 1850, and the petitioner charged adultery in 1857. The respondent pleaded, that after the marriage the petitioner was guilty of several acts of cruelty; that in 1852 and 1857 he committed adultery, and that he had also been guilty of wilful neglect and misconduct. The petitioner denied the truth of these pleas, and thereupon issue was joined.

Dr. Spinks (*Francis* with him), for the petitioner, said, that as the respondent had not denied her adultery, she ought to begin.

Dr. Phillimore, Q.C., for the respondent, submitted that the wife, whose case would depend on the cross-examination of the petitioner's witnesses, need not prove her pleas until the petitioner had given evidence of his allegations of adultery.

CRESSWELL, J.O.: There can be no difficulty in acting on the Common Law rule. The persons who would be called by the petitioner to prove adultery, can be called by the respondent to prove cruelty. There is no hardship on her.

If she relies on the persons to be called by the petitioner, she can call them herself. The intention of the Legislature was, that issues of fact should be tried as in the Common Law Courts. The jury have nothing to do with the wife's adultery. It is taken out of their cognizance by the pleadings. If any injustice would arise, I might take it into consideration, but I do not see how that is possible.

Dr. Phillimore opened the case, and called a witness to prove the plea of cruelty.

The jury found that the cruelty had not been established, and a verdict was entered for the petitioner on all the issues.

The jury were then discharged, and the petitioner proceeded to call witnesses in support of the allegations of marriage and adultery.

Dr. Phillimore proposed to cross-examine them.

Dr. Spinks objected. The respondent made no answer as to this part of the case.

CRESSWELL, J.O.: *Dr. Phillimore* cannot cross-examine the witnesses upon these pleadings. The adultery has not been denied.

The adultery of the respondent was then proved. The decree for a dissolution of marriage was suspended to give time for an application with regard to the marriage settlements.

DIVORCE AND MATRIMONIAL. Nov. 25, and Dec. 7, 1859.

MIDGELEY *v.* WOOD.

(BEFORE THE FULL COURT:—CRESSWELL, J.O.; WIGHTMAN, J., AND BYLES J.)

MIDGELEY, falsely called WOOD *v.* WOOD.

Nullity.—Undue Publication of Banns.—4 Geo. IV. c. 76, ss. 7 and 22.—Costs.

Quære—Whether a respondent in a suit of nullity by reason of undue publication of banns, who pleaded in confirmation of the petition, would be precluded by the dismissal of that petition from presenting another founded upon the same allegations?

A marriage by banns, where by the consent of both parties the name of the man was falsely stated to be "John," his baptismal name being "Bower" only, was declared null and void.

The man was condemned in costs because he induced the woman to consent to the undue publication by telling her that it would not render the marriage invalid.

The petitioner, Margaret Midgeley, prayed to have a marriage *de facto* between herself and the respondent, Bower Wood, declared null and void, alleging that there was no due publication of the banns, the respondent being called John instead of Bower, with the knowledge of both parties, for the purpose of concealment. The respondent pleaded that at the time of the publication the petitioner assented to the use of a false name knowing its purpose.

The banns were published on the 28th March, 4th April, and 11th April, 1852, and the *de facto* marriage was on the 12th April, 1852, at Manchester. Miss Midgeley was described in the register as a spinster aged 20, and Mr. Wood as a bachelor aged 22. The publication in the false name of John was for the purpose of concealing the marriage from the grandfather of Wood, upon whom, his father and mother being dead, he was dependent. A short time after April, 1852, the grandfather became acquainted with the fact of a marriage, but the certificate was shown to him to induce him to believe that the John Wood who had been married was not the same person as his grandson Bower Wood. Soon after the marriage the respondent entered the Military Academy at Chelsea, to qualify himself as an army schoolmaster, and he passed as a single man until 1853. The petitioner saw him in 1853, but from 1854 to 1858 there was no communication between them. Upon his recommendation she engaged herself as a domestic

servant, and so maintained herself. In 1858 Wood was a pay-clerk at Chatham, and had a small farm in the neighbourhood. In 1855 the grandfather had died, and left him by will £1000 and an annuity of £50, which in the event of his death, bankruptcy, or insolvency, was to go to his wife if he were married.

Dr. Deane, Q.C. (*Coleridge* with him), for the petitioner, cited *Wiltshire* v. *Prince* (3 Hag. Ec. 332); *Wright* v. *Elwood*, (1 Cur. 662); *Tongue* v. *Tongue* (1 Moore's P. C. 90), and 4 Geo. IV. c. 76, ss. 7 and 22 (*a*).

Margaret Midgeley, the petitioner was examined: It was after the first publication of the banns, but before the marriage, that Wood told me his real name. He had said before that his name was John Philip Bower Wood. After the marriage I sometimes called him John, but I generally called him Philip. He promised to introduce me to his grandfather, but he never did. I spoke to him several times about his name, because I thought that John was not his real name. I asked him if the marriage would be legal in that name if it were not his real name, and he said "Yes." I objected to it, and it was a long time before I would consent to marrying him in that name. He said I must marry him, and trust in him afterwards.

Dr. Phillimore, Q.C. (for the respondent) applied for leave to cross-examine the petitioner. The respondent had pleaded

(*a*) 4 Geo. IV. c. 76, s. 7.—Provided always, and it is hereby further enacted, that no parson, vicar, minister, or curate shall be obliged to publish the banns of matrimony between any persons whatsoever, unless the persons to be married shall, seven days at the least before the time required for the first publication of such banns, respectively deliver or cause to be delivered to such parson, vicar, minister, or curate a notice in writing, dated on the day on which the same shall be so delivered, of their true Christian names and surnames, and of the house or houses of their respective abodes within such parish or chapelry as aforesaid, and of the time during which they have dwelt, inhabited, or lodged in such house or houses respectively.

4 Geo. IV. c. 76, s. 22.—Provided always, and be it further enacted, that if any persons shall knowingly and wilfully intermarry in any other place than a church, or such public chapel wherein banns may be lawfully published, unless by special license as aforesaid, or shall knowingly and wilfully intermarry without due publication of banns, or license from a person or persons having authority to grant the same first had and obtained, or shall knowingly and wilfully consent to, or acquiesce in, the solemnisation of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void to all intents and purposes whatsoever.

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in confirmation of the petition; but there was no collusion. He had no desire whatever to continue his connection with the petitioner. He had not heard of her for a number of years, and imagined that she was dead; but in 1858 he was disagreeably reminded of her existence, and this suit was soon afterwards instituted. The petition originally alleged that only one party was cognisant of the fraudulent publication, and therefore it was demurrable. The greatest doubt was entertained by the respondent's advisers whether the petition had been drawn up in that form intentionally, in order that there might be a failure of proof and a decree in favour of the marriage, or whether it was a *bonâ fide* error. The respondent then as now wished the marriage to be set aside, on the ground of the undue publication of banns, and he was therefore advised to plead the knowledge of both parties. Subsequently the petition was amended and the plea was unnecessary, but stood as a confirmation of the petition. Both parties were equally anxious for the success of the suit. He proposed to cross-examine the petitioner, and afterwards to examine the respondent, if necessary, in support of his plea. He was not aware of any precedent for such a state of the pleadings in a suit for nullity.

CRESSWELL, J. O.: The point is of great importance. You desire not only to question the petitioner, but to tender affirmative evidence for the respondent. Suppose the petition should ultimately be dismissed, would that decree be binding on both parties for the future? If a suit had been instituted in the Ecclesiastical Court for nullity, on this ground of undue publication, and the husband had appeared and given in an answer to the libel, confessing the different articles alleged, and then, the witnesses having been examined, the Ecclesiastical Court had dismissed the suit, could the husband afterwards have instituted a suit for nullity?

Dr. Phillimore: I am inclined to think it would have been *res judicata.*

Dr. Deane was of the same opinion.

CRESSWELL, J.O.: I should like to hear the question dis-

cussed on the part of the husband. If this petition were to result in a decree refusing a declaration of nullity, and that decree were to be binding upon both parties, it would tend to support the view that the respondent should be at liberty to call affirmative evidence. Otherwise the wife might institute a suit of this description and procure a decree which would be binding upon him. At all events you may cross-examine this witness *de bene esse.*

Margaret Midgeley was accordingly cross-examined by *Dr. Phillimore:* I last saw the respondent in 1854; I occasionally received 10*s.* a week from him, but never after he came to reside in London. I was quite aware before the publication that the name was changed in order to conceal the marriage. I do not know whether I was aware of it before the first publication or not.

To the Court: My object in presenting the petition is to know whether my marriage is legal or not. I made inquiries for Wood after he left Chelsea, but I could not ascertain what had become of him, until just before this petition was presented. My relations wanted me to see whether I was married or not. A clergyman in Yorkshire was very anxious to know whether the marriage was legal.

A witness proved that the respondent was baptised in the name of Bower only.

CRESSWELL, J.O., delivered judgment: It is unnecessary to say anything about the cross-examination of the petitioner. Independently of that, the allegations in the petition are established. There is ample authority for saying that a party to a fraud of this sort may by law come forward and avail herself of the wrong done, so as to get the marriage voided. Where parties marry, knowing that there is not a due publication of banns, the marriage is null. Although in this case the woman might suppose that John was one of the man's names, and might believe it sufficient to make the marriage a good one; yet at the same time she knew it was not a proper publication of both his Christian names. As to the time when she became cognisant of the fact, she states that it was communicated to her before the banns were put up, and at all events, she must have known it before the marriage. If she intermarried under those circumstances, that is sufficient. The Court pronounces the marriage null.

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Dr. Deane applied for costs.

Wightman, J.: They are both equally to blame.

CRESSWELL, J.O.: The Court will consider the question of costs.

Dec. 7.—CRESSWELL, J.O.: This case stood over upon a question of costs. It was a suit by a woman for a declaration of nullity of marriage in consequence of a fraud perpetrated by both parties to the marriage, by putting up banns in a false name. It was suggested that the Court was bound to grant costs to the petitioner according to the usual practice in the Ecclesiastical Court. But I think I am not bound to grant costs to her upon any such principle. She is not a wife, and she never was a wife. The marriage was null from the beginning. But there is another ground upon which I think I ought to grant her costs. It appeared that the respondent allured the woman into this form of marriage, by telling her that it would be a good marriage, and so did her a grievous wrong. She supposed that she should become his wife. She consented to the use of the false name, thinking that it would be a good marriage. He led her into a most distressing position, and she said very naturally, "I was strongly urged not to remain in this doubtful state, but to have it ascertained whether I was a wife or not." The Court will therefore grant her costs.

Marriage declared null and void, with costs against the respondent.

PROBATE. Nov. 16, and Dec. 7.

BAYLEY *v.* BAYLEY.

(BEFORE SIR CRESSWELL CRESSWELL.)

BAYLEY *v.* BAYLEY.

Sequestration.—Attachment.—Writ of Assistance.—Practice.

A writ of sequestration having been issued to enforce an order for the payment of costs, the sequestrator demanded possession of the property, which was in the hands of parties holding under the person whose estate had been sequestered, and was refused. The Court declined to enforce the sequestration by an attachment against those parties; but granted a writ of Assistance to the Sheriff for that purpose.

A writ of sequestration having been granted by the Court to enforce an order for the payment of costs by Bayley, the sequestrator had demanded the rents and profits of the estate, but the parties in possession, who were tenants under Bayley, refused payment.

Baker Green moved for an attachment against the persons who had refused payment of the rents to the sequestrator. The 25th sect. of the Probate Act (20 & 21 Vic. c. 77) enacted that the Court of Probate should have the like powers, jurisdiction and authority for "enforcing all orders, decrees and judgments made or given by the Court under this Act, and otherwise in relation to the matters to be enquired into or done by, or under the Orders of the Court under this Act, as are by law vested in the High Court of Chancery for such purposes, in relation to any suit or matter depending in such Court."

SIR C. CRESSWELL: A sequestration cannot be enforced in this manner *per saltum*. An attachment against the tenants is out of the question.

Motion refused.

Dec. 7.—C. Pollock moved for a writ of Assistance. The sequestrator having demanded possession, and having been refused, his proper course was to ask the assistance of the sheriff to enforce the writ. Not having been able to obtain peaceable possession, the sheriff was required to be present when the writ was enforced, in order that no illegal act might be committed. (Seton on Decrees, p. 425—Daniel's Chancery Practice, p. 822, 3rd ed.)

SIR C. CRESSWELL: Can a sequestrator, under a sequestration issued by the Court of Chancery, turn a man *vi et armis* out of his house, and take possession, without any preliminary proceeding in the nature of an ejectment.

C. Pollock: There is no rule in the books of Chancery Practice as to the proper mode of proceeding in a case like the present.

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SIR C. CRESSWELL: You may have a writ of Assistance, and take the consequences, whatever they may be.

Writ of Assistance granted (*a*).

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BEVAN *v.* BEVAN.

(BEFORE CRESSWELL, J.O.)

BEVAN *v.* BEVAN.

Dissolution of Marriage.—Second Petition.—22 & 23 Vict. c. 61, s. 6.

A wife prayed for a dissolution of marriage on the grounds of adultery coupled with desertion and cruelty. The case was tried before the passing of the 22 & 23 Vict. c. 61, which renders the wife competent to give evidence of desertion and cruelty. The full Court refused to dissolve the marriage on the ground that there was not sufficient evidence of desertion and cruelty, but pronounced a decree of judicial separation on the ground of adultery. After the passing of the 22 & 23 Vict. c. 61, she applied for leave to file a second petition for a dissolution, containing the allegations that she had before failed to establish. The Judge Ordinary granted leave, but expressed a strong opinion that the full Court would refuse to rehear the case.

On the 16th August, 1858, Amelia Bevan filed a petition for dissolution of marriage on the ground of adultery coupled with cruelty and desertion. On the 30th June, 1859, the case was heard by the full Court. Their Lordships were not satisfied with the evidence of desertion or of cruelty, and refused to dissolve the marriage, but pronounced a decree of judicial separation on the ground of adultery.

Dr. Spinks now moved that she might have leave to file a petition for dissolution of marriage containing the same allegations of adultery as well as of cruelty and desertion as the former petition. She would be able to establish those allega-

(*a*) A form of a writ of sequestration is to be found in Daniel Ch. Pr. p. 515 (3rd edit.), and that of an order for a writ of Assistance in Seton on Decrees, p. 425.

tions by her own evidence under the 6th sect. of the 22 & 23 Vict. c. 61. At the hearing of the former petition she was not a competent witness.

CRESSWELL, J.O.: If your object is to ascertain the impression now upon my mind as to the result, I do not hesitate to say that if such a petition were brought before the full Court they would dismiss it. In former days, many trials in the Common Law Courts took place when the evidence of the parties was excluded, and judgment was pronounced on the evidence then laid before the jury. I never heard that after the alteration in the law by which parties were allowed to be examined in their own behalf fresh actions were brought for old causes of action which had before been adjudicated. It appears to me, therefore, that this case, the party having had her petition for a dissolution of marriage heard, is *res judicata*. Such is my impression, but I do not refuse you permission to file the petition.

Application granted.

(BEFORE CRESSWELL, J.O.)

WHITE *v.* WHITE.

Judicial Separation.—Cruelty by Wife.—Alimony.—Costs.

The Court will grant a judicial separation to a husband on the ground of his wife's cruelty, where it is proved that the wife from drink or from any other cause is without the power of restraining herself from such attacks upon him as put him in danger of bodily injury.

A wife judicially separated from a husband on the ground of her cruelty, is not entitled to alimony.

A wife has a right to have a sum deposited in the Registry as security for the costs of the hearing of a suit instituted against her by her husband, and whether she fails or succeeds in the suit, that sum will be appropriated to the payment of her costs, but if she fails and the costs amount to more than the deposit, the Court will not order the surplus to be paid by the husband.

This was a petition by a husband for a judicial separation on the ground of his wife's cruelty. The respondent pleaded a denial of the cruelty.

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The petitioner, Robert White, was a dealer in theatrical costumes and spangles, and he married the respondent at the church of St. George the Martyr, Southwark, on the 25th October, 1847, having previously cohabited with her. They had three children, two boys and a girl. In 1850 she became subject to hysterical fits, and he complained that in 1852 she acquired habits of intemperance, and that her temper became violent and excitable. In 1854, and again in 1856, he was obliged to apply to the magistrates for protection from her violence, and she was imprisoned and bound over to keep the peace. He detailed several assaults and threats, and said that fifteen months ago he again took her before a magistrate, and had not since lived with her.

In cross-examination he denied several acts of violence imputed to him, such as striking and kicking her, but admitted that about three years ago, as he was slapping her face, a ring on his finger discoloured her eye. He had made her an allowance since the separation. During their cohabitation she was taken to Bedlam three or four times as an insane patient.

G. H. Cooper, for the respondent, said that on every occasion when acts of violence had been committed, the husband had begun the quarrel by teasing and provoking her, but even if there were no provocation, the acts were not of such a nature as to justify the Court in granting a decree. (*Kirkman* v. *Kirkman*, 1 Hagg. Const. 409; *Furlonger* v. *Furlonger*, 5 Notes of Cases, 422; *Waring* v. *Waring*, 2 Hagg. Const. 154.) She had passed a great part of her time in Bedlam during the last four or five years, and was not accountable for her actions.

The respondent in her examination said, that after her first confinement she had a nervous fever and became irritable in temper. She and her husband quarrelled about the business. She also felt jealous of her sister, and that caused quarrels. They had disputes about money, and about their families. She did not get drunk, but sometimes took a little to drink, and then she became more excitable than at other times.

CRESSWELL, J.O.: Some of the acts of violence were the cause of her being put into Bedlam. What would be the effect of the fact that she was not a responsible agent at the time when

many of the acts of violence were committed? Is there any case in which a divorce *a mensâ et thoro* was granted on the ground of cruelty, when the party guilty of the cruelty was suffering under an aberration of mind?

Dr. Spinks (with him *Pritchard*) for the petitioner:—I am not aware of such a case.

CRESSWELL, J.O.: I will examine the evidence carefully, as it may involve important questions. If any injury was sustained by either party, that which she sustained was rather greater than that which he sustained, for she has had her eye blackened, and there is no instance in which any mark has been made on him. If a wife gets drunk every day, I do not know that the husband would therefore have a right to a judicial separation.

Cur. adv. vult.

November 30.—CRESSWELL, J.O.: The Court is prepared to deliver judgment if either party prays for it.

Dr. Spinks for the petitioner and *Mundell* for the respondent prayed for judgment.

December 7.—CRESSWELL, J.O.: This was a petition for a judicial separation on the ground of cruelty. I have had considerable difficulty in satisfying my mind as to the decree I ought to pronounce. The principle on which the Court proceeds in these cases is clear enough. It is laid down by Lord Stowell in *Evans* v. *Evans* (1 Hagg. Const. 35); and in *Kirkman* v. *Kirkman* (1 Hagg. Const. 408). In the latter case Lord Stowell says: "This is a suit instituted by the husband for separation by reason of cruelty and harsh and violent treatment alleged against the wife. The Ecclesiastical Court is in general averse to relax in any degree the duties of the contract of marriage, and particularly to release married parties from the obligation of cohabiting together. It will not do so for mere words of abuse, however reproachful. The persons of both parties, however, must be protected from violence, and I cannot accede to what has been said in argument, that the Court should wait until there has been actual violence of such

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a nature as may endanger life. It is not to pause till a tragical event has taken place. Words of menace, if accompanied with probability of bodily violence, will be sufficient. It may be enough that they are such as inflict indignity and threaten pain. It will be the duty of the Court to say that the suffering party is not obliged to continue in cohabitation under such treatment." In the case now before the Court, it appeared that on many occasions the husband had been assaulted by the wife, and had resorted with success to the magistrates for protection. The extent of the injury he had suffered was not fully explained, but on one or two occasions it appeared rather of a serious character. The respondent was violent on many occasions, but her violence generally manifested itself in injury to her husband's property rather than to his person. She had been more than once placed in confinement as an insane person, and it was difficult to judge how much of her violence was to be ascribed to disease of the mind. Her own account of herself was very candid. She said she was in the habit of going out and drinking spirits, not in large quantities, but to a sufficient extent to agitate any excitable temper such as hers; that when she went home she and her husband began to dispute about trifles, and she became more and more excited, until she lost her self-control, and committed acts of violence. These quarrels appear to have preceded the attacks of insanity, but I should suppose that those attacks were the consequences and not the causes of the quarrels. The assaults do not appear to have been productive of any very serious bodily injury to the husband; but where a woman, either from drink or from any other cause, is entirely without the power of controlling herself and restraining herself from attacks upon her husband, it is impossible to say that he is not in such danger of bodily injury as to entitle him to the protection of the Court. I therefore feel bound to pronounce a decree of judicial separation.

Mundell prayed that permanent alimony might be awarded to the respondent. She had assisted the husband in establishing a business. A petition for alimony *pendente lite* had been presented, but no application had been made for an order, as the husband had made her an allowance.

Dr. Spinks: The petitioner is willing to make some provision for her if she will not annoy him again.

CRESSWELL, J.O.: I will suspend the decree in order that you may make the application on a future day, after notice to the other side.

December 14.—*Mundell* moved for permanent alimony to the respondent. Alimony *pendente lite* was awarded on the 29th July. In *Kirkman* v. *Kirkman*, 1 Hagg. Const. 409, the only reported case in which a husband had successfully maintained a suit for a divorce *a mensâ et thoro*, by reason of his wife's cruelty, the question of alimony was not mooted. On principle the Ecclesiastical Courts had power to award alimony in such a case. Oughton (Title 206); Ayliffe's Parergon, 50 (*a*); 1 Blackst. Comm. 441. If she eloped with the adulterer she could not claim alimony, but it was doubtful whether she was always deprived of it even by simple adultery. The Court having a discretion as to alimony, and the husband retaining the whole of the property, it would not allow him to get rid of the burden of maintaining the wife in every case in which she was to blame. *Lewis* v. *Lee* (3 Barn. & Cres., 291): *Manby* v. *Scott* (2 Smith, L. C., 346, and notes, 389 and 393, 4th ed.). But there was a difficulty in the 17th section of the Act (20 & 21 Vict. c. 85). The 22nd section directed that the Court should proceed and act, and give relief on principles and rules as nearly as might be conformable to the principles and rules of the Ecclesiastical Courts. The 17th section enacted that "application for restitution of conjugal rights or for judicial separation, on any one of the grounds aforesaid, may be made by either husband or wife by petition to the Court; and the Court, on being satisfied of the truth of the allegations therein contained, and that there is no legal grounds why the same should not be granted, may decree such restitution of conjugal rights or judicial separation accordingly; *and where the application is by the wife*, may make any order for alimony which shall be deemed just."

(*a*) "In the sense I shall here use the word alimony, it signifies that legal proportion of the husband's estate which, by the sentence of the Ecclesiastical Court, is allowed to the wife for her maintenance, upon the account of any separation from him, provided it be not caused by her elopement or adultery."

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CRESSWELL, J.O.: The difficulty placed in your way by the 17th section is enhanced by your inability to show any authority for your application in the practice of the Ecclesiastical Courts. You have to rely on an ambiguous argument founded on some passages in old books. If there was no such practice recognized in the Ecclesiastical Courts as that of granting permanent alimony to a wife who was divorced in consequence of her own misconduct, is it not almost imperative on this Court, looking at the 17th section, to refuse your application? Although only one case is reported, there were probably many cases in the Ecclesiastical Courts of cruelty by the wife, in which, the facts being clear, there was no discussion. The Registrar (Mr. Middleton) tells me he has himself been concerned in three such cases.

Dr. Spinks referred to the 29th rule.

Mundell: There was another question as to costs. In the course of the cause the costs of the wife were taxed, and the husband ordered to pay them, but they had not yet been paid.

CRESSWELL, J.O.: Of course they must be paid.

Mundell: An order was also made upon the husband to deposit £20 in the Registry for the expenses of the hearing of the wife's case. Her costs of the hearing rather exceeded that sum, and he moved that they might be taxed and paid by the husband.

CRESSWELL, J.O.: The old practice was to grant the taxed costs of the hearing to the wife beforehand, on the theory that she could not get the hearing without the money. But if she did get the hearing without the money and she was defeated, it was the practice not to grant her costs; for it was said that being in the wrong she was not entitled to them except on the supposition that she could not get a hearing without them. As a substitute for that mode of proceeding, it being impossible to conjecture now what costs ought to be allowed for the hearing, a sum is paid into Court as security for costs sufficient to enable the wife's case to be heard. In this case the sum deposited has answered the purpose of bringing the case before the Court, and to the extent of that deposit, she may have the costs of

the hearing, although she was not successful. But I should be breaking through the old rule if I gave her more. (*a*)

Judicial separation granted; order for alimony refused; and order for wife's costs of the hearing beyond the sum deposited in the Registry refused.

(*a*) In *Brittain* v. *Brittain and Camp*, the respondent pleaded a denial of the allegations of adultery on which the petitioner founded his prayer for a dissolution of the marriage, and issue having been joined, the case was tried before CRESSWELL, J. O., and a Common Jury, and the Jury found that the adultery was established. On the 25th May, 1859, *Pigott*, Serjeant, and *Turner* (for the petitioner) moved the full Court (Lord CAMPBELL, C. J., MARTIN, B., and CRESSWELL, J. O.) for a decree of dissolution; and *Lilley* and *Laxton* (for the respondent) moved that the petitioner might be ordered to pay the respondent's costs of the trial before the jury. No application for the costs of the hearing had been made before the trial.

CRESSWELL, J. O., said: The principle upon which the Ecclesiastical Courts proceeded was this. The wife having no money to enable her to defend herself the husband must pay her costs. Accordingly her costs were taxed de die in diem, and when everything was ready for the hearing, and nothing remained but the argument, an application was made beforehand on her part for the costs of the hearing. The proper sum was then ascertained by the registrar, and it was deposited in the registry. The object was that the wife might have the benefit of the assistance of counsel. But if no application was made on her behalf until after the hearing, and the decree was against her, the practice was to refuse her costs.

Lord CAMPBELL, C. J.: If the costs are to come out of the husband's pocket whether the wife is successful or not, a great temptation will be held out to attorneys to take up speculative cases.

Lilley said the wife's attorney could know nothing of her case, except from the statement she made him.

Lord CAMPBELL, C.J.: If the application for costs had been made before trial, the Court would have granted it, in order that the wife might be heard. In this case she has been heard; and it appears there was no ground for her defence. As the attorney has omitted to take advantage of the opportunity of having the costs deposited before the trial, he cannot now throw the burden upon the husband.

MARTIN, B., thought it was unjust to make the husband pay in all cases. At common law a wife who had been guilty of adultery could not pledge her husband's credit.

CRESSWELL, J. O.: The rule frequently operates with great hardship, but it is to be upheld upon the humane principle that the wife would be helpless unless this provision was made for bringing her case into Court. But after the suit has been brought to a hearing without her costs being deposited, and it has been established that she has no meritorious case, the husband ought not to be obliged to pay her costs, for she cannot suffer any injury for the want of them. The attorney must take the consequence of not having made the application in proper time.

The marriage was dissolved, and the application for the costs of the wife refused.

See *Evans* v. *Evans and Robinson*, 1 Sw. & Tr. 330, & 28 L. J.; P. & M. 138; and *Keats* v. *Keats and Montezuma*, 1 Sw. & Tr. 358, & 28 L. J.; P. & M. 79.

DIVORCE AND MATRIMONIAL. DEC. 2, 3, & 5.

ALLEN *v.* ALLEN and D'ARCY.

(BEFORE THE FULL COURT:—CRESSWELL, J. O.; WATSON, B., and HILL, J., and a Special Jury.)

ALLEN *v.* ALLEN and D'ARCY.

Dissolution of Marriage.—Adultery.—Connivance.—Cruelty.—Condonation, 21 & 22 *Vict. c.* 85, *Secs.* 29 & 30.

A husband who knows of the existence of such a state of things as would in the apprehension of reasonable men result in the adultery of his wife, and who intending that result to take place does not interfere to prevent it, is guilty of connivance.

A jury found that a wife had been guilty of adultery, but that the husband who prayed for a dissolution of marriage on the ground of that adultery had conspired with the co-respondent and other persons to induce her to commit it. The Court having no doubt of the propriety of the verdict, at once dismissed the petition with costs.

If a wife, who has been treated with cruelty, has brought that treatment on herself by her own violent conduct, she cannot set it up as an answer to a petition for a dissolution on the ground of her adultery.

This was a petition by Thomas Allen for a dissolution of his marriage with Harriet Ellen Allen on the ground of her adultery with Robert D'Arcy. The respondent pleaded a denial of the adultery, condonation, and connivance, and also charged the petitioner with adultery and cruelty. The petitioner replied by alleging condonation as to the adultery and denying the cruelty, but pleaded that if it had been committed it had been condoned. Leave had been given to the petitioner to proceed without service of the citation and petition upon the co-respondent.

Edwin James, Q.C., *Dr. Deane*, Q.C., *Dr. Wambey*, and *T. L. Clark*, for the petitioner.

M. Chambers, Q.C., *Hawkins*, Q.C., and *Dr. Spinks*, for the respondent.

Mr. Allen was a trunk-maker and military outfitter, carrying on business in the Strand. He first met the respondent at a dancing saloon in St. Martin's Lane, when she was the kept

mistress of another man, and married her on the 6th of June, 1852. They lived together for a short time at the plaintiff's place of business, afterwards, for three or four years, at Albion Villa, Hammersmith, and then at Carlton House, Knightsbridge, where they remained until their separation in 1858. Two children were born during their cohabitation, and a third after the separation. They had frequent quarrels between 1855 and the separation, in which both of them committed various acts of violence. In April, 1858, Mrs. Allen discovered that her husband had formed an adulterous connection with one Mrs. Claverton, and their quarrels became more frequent on that account. In May, 1858, Mr. Allen ran away with Mrs. Claverton, intending to go to America, but Mrs. Allen followed them, overtook them at Southampton and induced Mr. Allen to return. They continued to live together until August, 1858, upon tolerably friendly terms. In that month they went with their children to Brighton and took lodgings at No. 3, Marine Parade. About a week after their arrival they were visited by Captain D'Arcy, the co-respondent, with whom they soon became very intimate. On Tuesday, the 31st August, Mrs. Allen went to London on business, and was expected to return the same night. Mr. Allen, however, received a telegraphic message from her, stating that she had missed the last train and could not return until the next day. She did return on the 1st September, and Mr. Allen then caused inquiries to be made by a detective officer, which resulted in the discovery that she had passed the night of the 31st August at the Gloucester Hotel, in Piccadilly, with Captain D'Arcy. This information was given to Mr. Allen on the 6th September, and he immediately separated from her, and filed the present petition. Alimony *pendente lite* had been awarded to her by the Judge Ordinary, at the rate of £5 per week.

The material parts of the evidence were as follows:—

Miss Mary Ann Gully said, she knew Mrs. Allen before her marriage. She frequently visited her and Mr. Allen after their marriage. Mr. Allen treated his wife with kindness, and was liberal to her in money matters. About the 25th August, 1858, she went to stay with them at Brighton. Captain D'Arcy visited them there, but she never observed any improprieties between him and Mrs. Allen. On the evening of the 30th August, she and Mr. and Mrs. Allen and D'Arcy supped together at

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Mutton's, the pastrycook's, and afterwards went to Mr. Allen's lodgings. D'Arcy stayed till about 11 o'clock. He called the next morning. While he was there Mr. Allen went out, and he and Mrs. Allen were together by themselves for about a quarter of an hour. Mrs. Allen went to London after luncheon on that day by the one o'clock train. Mr. Allen went to the station to meet her in the evening, but she did not return. Mrs. Allen returned the next day, and told witness that she had dined with D'Arcy; that D'Arcy had offered to take her to the railway station after dinner; that they started in a cab, but the horse was lame and they were too late for the train; that D'Arcy said it would be better to take rooms at the hotel where they had dined and remain until the morning; that they returned to the hotel; that D'Arcy was then taken ill, and that he remained so dangerously ill all night that she had been obliged to wait on him, and had been unable to go to her own room. Witness left Brighton on the 6th September.

Cross-examined.—There were three children of the marriage. The youngest was six or seven months old, and was born since the separation. There was a good deal of strife between Mr. and Mrs. Allen, especially after they went to live at Carlton House. A lady was in the case. It was Mrs. Claverton, a loose woman, whom Mr. Allen kept at a house in Titchborne Street. Mrs. Allen found it out in April, 1858, and they were afterwards very unhappy. He complained of her jealousy. In May, 1858, Mr. Allen went away, leaving her at Carlton House. She was in great distress. In a few days she found out where he was and went to fetch him. She came back in a day or two and said she had found him at Southampton with Mrs. Claverton; that they were passing as Captain and Mrs. Blake, and were about to start for America. He continued to complain of Mrs. Allen's bad temper and jealousy from that time until they went to Brighton. John Boxell was a friend, or rather an acquaintance, of the Allens. She never heard that he had been a waiter at the Crystal Dancing Saloon, St. Martin's Lane, or at the Hen and Chickens public-house, in Birmingham, but she knew he was in poor circumstances. She did not know that his real name was Milburne. She had seen a Mr. Gillman at Mr. Allen's, but never heard him called Dr. Gillman, or Captain Mills, or Rhodes, or Bateman. She had seen Boxell at Mr. Allen's lodgings at Brighton. She was introduced to

D'Arcy the day after she arrived at Brighton. He and the Allens rode out on horseback together. She believed that Mr. Allen paid D'Arcy's horse hire. D'Arcy was staying at the New Steyne Hotel all the time. He dined with the Allens about three times while she was there. After he left them on the evening of the 30th some words passed between Mr. and Mrs. Allen about some rudeness in Mrs. Allen's conduct to him, to which Mr. Allen attributed his abrupt departure. He had complained of being ill, and either Mr. or Mrs. Allen had offered him some medicine. Mr. Allen spoke about Mrs. Allen's rudeness at breakfast on the morning of the 31st, and said he would go to the New Steyne Hotel and see D'Arcy. He went out, and returned in about half-an-hour with D'Arcy. Witness and Mrs. Allen were then in Mrs. Allen's bedroom. Mr. Allen came up and told Mrs. Allen she must go down stairs to D'Arcy and apologise. He then went out, saying he was going to pay some tradesmen's bills, and Mrs. Allen went down to D'Arcy. When Mr. Allen returned D'Arcy was gone. Mrs. Allen went to town in consequence of some letters which Mr. Allen had received from Mrs. Claverton. She asked witness to go with her, but she refused. Mr. Allen went with Mrs. Allen to the station. On the night of the 1st September Mr. and Mrs. Allen slept together, and continued to do so until the 6th September.

Miss Gully was recalled before the close of the petitioner's case, and stated that on the morning of the 31st August she was in the sitting-room with Mr. Allen when a letter addressed to Mrs. Allen was brought in by the servant; that Mr. Allen opened the envelope and took out two letters, that he put them back into the envelope without opening them, and handed them to Mrs. Allen, who at that moment entered the room. Mrs. Allen read one of the letters to her husband. This letter contained an apology for some "forgetfulness in the respect due" to Mrs. Allen, of which he fancied that he had been guilty on the preceding evening, and requested her to commend him to her "kind husband," and "accept the assurance of his highest esteem and gratitude." The second letter, which Mrs. Allen did not show to her husband, was dated "Monday evening, ten o'clock," and contained a declaration of love couched in the most extravagant language. Miss Gully added, that Mrs. Allen showed her both these letters, and called the latter "non-

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sensical." It was after the first had been read to Mr. Allen that he went out to fetch D'Arcy.

John Lewis said, he was formerly in the city police force, and now made private inquiries as a detective. On Friday the 3rd September, he received instructions from Boxell to find out where Mrs. Allen had slept on the night of the 31st August. On the same day he ascertained that she had slept at the Gloucester Hotel. On Monday the 6th September he went to Brighton with the waiter and chambermaid of the hotel, and they identified Mrs. Allen, and he gave the information he had obtained to Mr. Allen.

Cross-examined.—He never saw Boxell before he received the instructions from him. A city detective named Bull was with Boxell. The first place he went to was an hotel in Sloane Street. That was by Boxell's directions. He then went to an hotel between that and the Gloucester, and then to the Gloucester. The hotels were all on the same line of road. Boxell gave him the names of several, and the Gloucester was amongst them. He had never seen Mr. and Mrs. Allen before he went to Brighton on the 6th, and he was then introduced to them by Boxell.

Nicholas Flight, a waiter at the Cadogan Arms in Sloane Street in August, 1858, proved that Mrs. Allen called there about two o'clock in the afternoon of the 31st August, and said a gentleman would call for her at seven o'clock; that at seven o'clock she returned and met a gentleman, and that they went away together. He knew Mrs. Allen because she and Mr. Allen had dined together at the hotel a short time before.

William Cook and Mary Ann Merring, the waiter and the chambermaid at the Gloucester Hotel, and the most material witnesses upon the issue of adultery, were then examined. Their evidence will be found in his Lordship's summing up.

Thomas Boxell, a watchmaker in the King's Road, Brighton, stated, that on the 7th September Mrs. Allen came to his house and wrote two letters to her husband, which she gave him to deliver.

The first of these letters was addressed to "My dearest husband," and contained the following expressions: "Do not let this horrid affair come to the public ear." "Forgive me this offence, and I will forgive you." "It is the first time I have given way since I have been your wife." "I have confessed all."

"Pray have mercy, for God's sake. I am truly repentant for what has passed." The second letter consisted of protestations of affection and entreaties to be allowed to return home.

In cross-examination Mr. Boxell said, that he was friendly but not intimate with his brother John, that John was a waiter at the Hen and Chickens at Birmingham about fifteen years ago, that in 1855 he was a bar waiter at the Wellington Dining Rooms in London, and that last year he kept a refreshment stall at the Adelphi theatre. He did not remember that his brother was ever the manager of a dancing saloon. About the 5th or 6th September, Gillman came to his shop to ask for his brother, who was then living in Windsor Street. His brother was now living in Hepzibah Terrace at Dalston. He had seen Mr. Allen and the children there, and he believed they were living there. His brother was now in Court.

Re-examined: He had been in business in Brighton for sixteen years.

William Cornell, a parliamentary agent, said he had been on visiting terms with the Allens for some years, and thought Mr. Allen an exceedingly kind and affectionate husband. On the 2nd Sept. 1858, he went to Brighton by their invitation. This witness was present when Lewis went to Mr. Allen with the information of the adultery, heard a long discussion, and then saw Mr. and Mrs. Allen drive in a fly to the office of Mr. Somers Clark, a solicitor.

Cross-examined: He was present at Mr. Allen's house one night in May 1858, when Mr. and Mrs. Allen returned from Southampton. They arrived between 9 and 10 o'clock. Mrs. Allen had taken one of the children with her. She said she had found him at Southampton with Mrs. Claverton, that he intended to go to America, but she had induced him to come back. Whenever they quarrelled afterwards, the Southampton story was brought up. Mrs. Allen was not a very well educated woman. She could not spell. He had heard that Mr. Allen met her at a dancing saloon in St. Martin's Lane. He knew Boxell by sight as an acquaintance of Mr. Allen's.

Re-examined: Mr. Allen built Carlton House, and it was his property.

Mr. Somers Clark, a solicitor at Brighton, gave an account of a conversation between Mr. and Mrs. Allen and himself, at his office, on the 6th September, in which certain admissions were

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made by Mrs. Allen. This conversation is detailed in his Lordship's summing up.

Mary Ann Wheeler said, that three years ago she went to nurse a sick child of Mr. and Mrs. Allen's, at Albion Place. His conduct was kind and affectionate. She was a woman of violent temper. There was a dispute one day at dinner because the cook had made some mistake about the gravy. He preferred the cook's gravy to Mrs. Allen's. Mr. and Mrs. Boxell, and Miss Terry, the governess, were dining there. Mrs. Allen came upstairs to the nursery, and Mr. Allen followed her. He pushed her against the side of the bed, and they both fell down together. When she was on the ground he pressed his finger on her ear, and the blood flowed from her mouth and nose. There was a scuffle between them.

Eliza Clackwell said, she was in the service of the Allens in 1858. Mrs. Allen was a woman of violent temper. Witness had seen her take a carving knife, and believed that she cut him with it. That was after he returned from Southampton. He was kind to her as far as witness could see. She remembered Mr. and Mrs. Allen going to Mr. Claverton's house to fetch a portrait of Mr. Allen. She insisted on his going. Mr. Boxell and witness went with them to Nutford Place. Mrs. Claverton was at home. The portrait was smashed, and it was thrown down the area by Mrs. Allen.

Cross-examined: She had seen Mr. Allen strike Mrs. Allen. There was a disturbance at Brighton, but she did not remember seeing him strike her.

Thomas Heath said that Mr. and Mrs. Allen were married on the 6th of June, 1852, at St. Paul's, Covent Garden, and that they were living together as man and wife before the marriage.

Dec. 3.—*M. Chambers* addressed the Jury for the respondent. With regard to the adultery, the only direct evidence was that of Mary Ann Merring, the chambermaid, and she was not worthy of belief. Allen was anxious to get rid of his wife, and introduced D'Arcy to her with the intention of causing her to commit adultery. D'Arcy, Boxell, Gillman and Allen, had conspired to get up a case against her, and if she had committed adultery, it was with her husband's connivance.

J. Walter Meldon, manager of a branch of the London and Westminster Bank, said, that in May, 1858, Mr. Allen had £50

sent to him at Southampton, together with a letter of credit for £200 upon an American house.

Henry Badcock said that in May, 1858, he was proprietor of the Pier Hotel, Southampton. Mr. Allen and Mrs. Claverton passed a few days there under the names of Captain and Mrs. Blake.

Eliza Archer was in the service of Mr. and Mrs. Allen in 1856. Mrs. Allen began the quarrel about the gravy at dinner. She threw the gravy over the table and upon his shirt. Witness held her because she wanted to take the poker to him. She threw the dish at him and went out of the room. He threw a tumbler after her. She went upstairs into the nursery. He followed and struck her on the head, and she fell.

Cross-examined: They were both occasionally the worse for liquor.

Theresa Ogle, a barmaid at an inn in the City, said that in June, 1858, she visited Mr. and Mrs. Allen. Gillman and Boxell visited them. On one occasion, when Mrs. Allen had invited her to spend the evening, Mr. Allen asked her where she lived, and requested permission to come and see her. He placed his arm round her. Mrs Allen was playing the piano, and witness was sitting next to her. She became very angry, threw her fan at him, and went into the garden. He followed, and they fought together until her outside clothes were torn off, and his clothes very much injured. Mrs. Allen then fainted. Boxell and Gillman picked her up, and put her in a warm bath. She was very much bruised. She was rather excited with champagne.

Mark Dewsnap, a surgeon, said he had attended Mr. and Mrs. Allen since 1856. He had seen bruises on her wrists as if she had been held. He had remonstrated with Mr. Allen, who said his wife had a very violent temper, and the only way to quell her was to fell her like an ox. In June, 1858, witness refused to give a certificate of her insanity. She was a very powerful woman, very jealous, and excessively violent.

Dr. Tuke said he kept an establishment for insane persons at Chiswick. In June, 1858, Mr. Allen and two gentlemen called on him. One of them said he was a medical man. Mr. Allen asked him to receive Mrs. Allen into his establishment. He pointed out that it was impossible to do so without the proper certificates, and asked who was her medical attendant, and was told it was Mr. Dewsnap. He called upon that gentleman,

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Mr. Allen requested him to see Mr. Dewsnap and Mrs. Allen. He never thought that she was a fit person to be confined in a lunatic establishment.

William Smith Turner said he kept the Crown Inn, Brighton. In August, 1858, Gillman came to stay at his house. D'Arcy also came a few days afterwards. Boxell visited them. They first used the Coffee Room, but in five or six days they had a private sitting room. Mr. Allen called to see them. D'Arcy left his house on Tuesday the 30th or 31st August. Gillman stayed about four nights after D'Arcy left. He had since seen D'Arcy in Paris. He went there to identify him.

Mr. Hollier said he was proprietor of the New Steyne Hotel, Brighton, in 1858. On the afternoon of September 1st, D'Arcy came and slept there that night. He was not there on the 30th or 31st August. He only had bed and breakfast, a sheet of note paper and an envelope. Witness could not say whether he called before the 1st September to engage the bed.

Jane Frost, a servant at 3, Marine Parade, said that Boxell and Gillman visited there.

Mr. Hartman, the landlord of a house in Nutford Place, Edgeware Road, said that Mrs. Claverton at one time lived there. Mr. Allen visited her. Witness at first thought he was Mr. Claverton, but in May, 1858, Mrs. Allen informed him of the real state of the case, and he gave Mrs. Claverton notice to quit.

Dr. Swallow said he had visited Mrs. Claverton at Nutford Place, and had seen Allen there. He dined on one occasion with Allen and Boxell at a café at the top of the Haymarket. Mrs. Claverton afterwards removed to Knightsbridge.

Mr. Cully had known Mr. Allen for four or five years. He first met him at some wine rooms in Cheapside, where John Boxell was waiter. He also knew Mrs. Claverton.

John Solomons said he was attorney for a Mr. Harding in an action which he brought against Milburne. In August, 1858, Milburne wrote letters to him from the Crown Hotel, Brighton. Harding was a young man, a minor, who had expectations, and the action was for money which Milburne had received on his account. Milburne professed to be Harding's agent. These letters (letters of D'Arcy produced) were in Milburne's handwriting.

This was the case for the respondent.

Edwin James, in reply, put in a letter from Mrs. Allen to her husband, dated 22nd July, 1858, in which she requested him to take her somewhere out of town as soon as possible for the benefit of her health, and subscribed herself, "Your own affectionate wife."

M. Chambers summed up for the respondent.

Dec. 5.—Edwin James replied upon the whole case. The adultery of Mr. Allen was proved. There was no evidence of the conspiracy to induce her to commit adultery, which had been charged against her husband. The adultery of which Mr. Allen was guilty in May, 1858, was condoned, and the allegations of cruelty had not been established.

HILL, J., summed up: Gentlemen of the Jury, Thomas Allen has presented a petition to this Court against his wife Harriet Ellen Allen, in which he alleges that she committed adultery with Robert D'Arcy, on the 21st August, 1858. Mrs. Allen denies the adultery in her answer, and goes on further to allege, that if she did commit it her husband connived at it and condoned it. This is denied by the husband. She also alleges that her husband committed adultery with Mrs. Claverton, and that he treated her cruelly on divers occasions. The husband, in addition to denying connivance at and condonation of his wife's adultery, says, "It is true I committed adultery, but my wife condoned that adultery." She denies that she condoned it. He further says, "I did not treat her cruelly, but if I did she has condoned it." She denies that condonation. These are the questions upon which you will have to give your judgment; and I will proceed to call your attention to the evidence given with regard to these several matters. The first question in point of order is that of adultery, and probably upon that you will have very little difficulty, for all the evidence appears to be one way. The first direct evidence of the adultery is that Mrs. Allen went up to London on the 31st of August, and that D'Arcy also went up to London on the 31st August, each of them going on business belonging to herself and to himself; not appa-

rently for a common purpose. It was also proved that on the morning of the 31st August a letter was received by Mrs. Allen from D'Arcy, containing expressions which no woman could possibly misunderstand. They are extravagant expressions of admiration quite sufficient to put her on her guard, and to show that he hoped to have a further intimacy with her inconsistent with the duty she owed her husband. She and D'Arcy go to London, and the first witness as to what took place when they arrived is Nicholas Flight, the waiter at the Cadogan Arms, in Sloane Street. He states that Mrs. Allen came there with another lady about 2 o'clock in the afternoon of the 31st August: that she ordered a bottle of wine, and said that a gentleman would call for her about seven o'clock."—"She went away and a gentleman called about five o'clock. I told him what Mrs. Allen had told me. She called again a few minutes before seven. The gentleman came in very shortly after; he went into the coffee room to her and they went away." Thus you have them brought together and leaving the Cadogan Arms about seven o'clock. The next witness, William Cooke, says,—"In August, 1858, I was a waiter at the Gloucester Hotel, Piccadilly. A lady and gentleman came there on the 31st August, about seven in the evening. They inquired for a sitting room, ordered dinner, and dined in it. About nine o'clock they went away in a cab, and told the cabman to drive to the London Bridge Station. They returned about eleven, and asked if they could have a bed" (they asked not for rooms or for accommodation for the night, but for a bed). "They engaged a bed-room and sitting-room. I served them with a bottle of champagne. I saw Mrs. Allen again on the 6th September at Brighton, when I was with Lewis." On cross-examination he said,—"I did not let them out of the cab; I went to the door. They said they were too late for the train. Lewis spoke to me on the following Friday. There was a gentleman with him." And then he goes on to give evidence as to what passed at Brighton when he went there to identify Mrs. Allen. Then Mary Ann Merring is called, and says,—"I was chambermaid at the Gloucester Hotel on the 31st August. Between ten and eleven at night a lady and gentleman came to the Berkeley Street entrance of the hotel. The lady asked if they could have a bedroom." That is her statement, and it is important to bear it in mind, because the learned counsel

for Mrs. Allen dwelt upon the argument that the bedroom was Mrs. Allen's room, and was not occupied by D'Arcy. It is for you to say whether it is possible under the circumstances stated in the evidence, to arrive at such a conclusion—"I showed her into a bedroom. The lady said they were too late for the train, that her servants would be much disappointed at her not returning, and asked me to lend her a night-dress, comb and brush." A great many observations have been made about the gentleman not having asked for a night-dress or brush and comb, and you will give them what weight you think they deserve.—"She said they wished to be called at eight in the morning. A little before eight there was a ring at the bedroom bell. I answered it, and the lady opened the door in a flannel petticoat, and ordered soda-water and brandy. The gentleman was in the bed." She at first said he was in the bed with his trowsers on, but immediately corrected herself and said he was in the bed undressed.—"I afterwards made the bed. Two persons had slept in it." I am compelled, gentlemen, to make an observation upon the argument of the learned counsel for Mrs. Allen upon this part of the evidence. He placed great reliance upon the fact that no direct evidence was given as to the state of the linen, the night-dress and the sheets. But the learned counsel for the petitioner in his examination in chief got from the witness the fact that two persons had slept in the bed, and it was open to the learned counsel for Mrs. Allen in cross-examination to inquire what the state of the linen was, to show that no adultery had been committed, although the chamber-maid said that two persons had slept in the bed. Then the witness speaks to the identity of the lady, and continues,—"On the following Wednesday she came to the Gloucester Hotel. I took her up-stairs into a private room. She burst into tears and asked me if I would state what I had said about her. I told her exactly what I have stated to-day. She said, 'I told you the soda and brandy was for the gentleman.' I said, 'No, ma'am, you did not.' She said, 'The gentleman was outside the bed with his trowsers on.' I said, 'No, ma'am, he was in the bed.' She said, 'It will be brought into court, and if you say what you have said to me, I shall be a ruined woman.'" You, probably as men of the world, will attach very little importance to the fact whether D'Arcy had his trowsers on or not, or whether he

was lying outside or inside the bed. For what purpose was he in that bedroom with another man's wife in that condition, he having no bedroom of his own?—"She said, 'I will make you any recompense in my power if you will say the gentleman was outside the bed.' I said, 'No, ma'am, he was in bed, at the side nearest the window.' She said, 'I told you the brandy and soda-water was for the gentleman, because he was ill.' I said, 'No, ma'am, you did not.' I said there was nothing in the utensil in the room to show that anyone had been ill." Then she goes on to speak of the ordering breakfast when she took up the brandy and soda-water.—"The lady said to the gentleman, 'Dear, what shall we take?'" This shows the relationship which then existed between Mrs. Allen and this man.—"He said, 'tea and coffee, as quickly as possible, and let us have something relishing.'" In cross-examination this important fact is elicited—that she told the attorney for Mrs. Allen what she has now stated, and he has not been called to contradict her. You must see whether you can come to any other conclusion upon this evidence than that the adultery was committed. Then there is the evidence of Mary Ann Gully, who says that when Mrs. Allen returned to Brighton on the 1st September, she told her that she had dined with D'Arcy in London on the day before, that he offered to see her to the train, that the horse of the cab in which they drove to the railway station was lame, and they were too late for the train; that D'Arcy said it would be better to take rooms at the hotel and remain until the morning; that they returned to the hotel, and that D'Arcy was there taken ill, and was so dangerously unwell that she was unable to go to her own room all night, and she had waited on him. Thus her account to Miss Gully, that she was unable to go to her own room all night, is directly contrary to the argument of her learned counsel that D'Arcy was in her room. Besides, how does the case stand upon her own statement by word of mouth and by letter—what does she say in the presence of Mr. Somers Clark, who is stated by both parties to be a respectable man, when she was at his office on the 6th September?—"She asked what she was brought there for. I told her," says Mr. Somers Clark, "I thought it would be better not to make any communication to her unless she had some friend present. She pressed strongly to know. After a time I told her I understood she had been to London, sleeping at an hotel

in Piccadilly on the preceding Tuesday. She said, 'Well, I know I did.' I said, 'Yes, but there is more than that. It is stated that you were sleeping there with D'Arcy.' She immediately turned round to her husband and said, 'I told you a lie; it is true that I slept at the hotel. It was the first time I ever wronged you, and you know how you provoked me.'" Gentlemen, you know what weight ought to be given to those words—"Some letters had been brought me. She said it was a sudden feeling that induced her to do wrong. I said there were letters which appeared to show premeditation. She fell on her knees, and asked Allen to forgive her and take her back. I said I thought it was not to be expected that Allen should go back with her, and the best advice I could give her was that she should go into lodgings, and remain there with her children until she had an opportunity of consulting some of her friends." After making these statements to Miss Gully and to Mr. Clark, and acknowledging that she had wronged her husband, she writes letters containing these expressions—"I never fell before.—That horrid man pressed me to do that which I am now sorry for from my heart.—Do, my dear Thomas, forgive me this offence.—It is the first time I have gone astray since I have been your wife."—You have therefore her confession by word of mouth, in the presence of Mr. Clark, her confession in writing, the direct evidence of the two servants at the Gloucester Hotel, and the inconsistent story she told on her return from London to Miss Gully. You will therefore probably have very little difficulty in saying whether you can come to the conclusion that adultery was committed.

Next in order arises the question—Did her husband connive at her adultery? This is a very grave question, and one that merits your entire attention. And first you must take the law from the Court as to what constitutes connivance. To find a verdict of connivance you must be satisfied from the facts established in evidence that the husband so connived at the wife's adultery as to give a willing consent to it. Was he or was he not an accessory before the fact? Mere negligence, mere inattention, mere dulness of apprehension, mere indifference will not suffice; there must be an intention on his part that she should commit adultery. If such a state of things existed as would in the apprehension of reasonable men result in the wife's adultery—whether that state of things was pro-

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duced by the connivance of the husband or independent of it—and if the husband, intending that the result of adultery should take place, did not interfere when he might have done so to protect his own honour, he was guilty of connivance. You will apply that rule to the facts before you. Its application in this case is not difficult, because the respondent puts it much higher than a mere lying by, for the petitioner is charged with having so conducted himself that he was a co-conspirator with others to produce the falling away of his wife. It is relied on in support of this case, that they lived unhappily together, and that their unhappiness arrived at such a pitch—whether it was that he was tired of her, or that he was worn out by her violence—that in 1858 he left her, intending to go to America with Mrs. Claverton, a person described as a loose woman. There is clear evidence that he did go first to Gravesend and then to Southampton with Mrs. Claverton, and that he made an arrangement with his banker that money should be sent to him at Southampton to pay his expenses there, and that he should receive a further sum on his arrival in New York, in order to carry out the purpose he had formed of deserting his wife and children. It is further stated that although his wife found him at Southampton and brought him back, and although he continued after that to live with her, yet he showed that he was determined to be quit of her by applying in the following June, in company with two other persons, to Dr. Tuke, in order that means might be taken to place her in a lunatic asylum. According to Dr. Tuke's evidence, it does not appear that any fraudulent or improper means were used by him to induce Dr. Tuke to receive her, because he was invited to see her, and from the statements made to him he came to the conclusion, without seeing her, that she was not a fit subject to be placed in a lunatic asylum. But the fact is important, as showing that at that time the husband was desirous of getting rid of his wife. It is further proved that a person named Boxell, who certainly, from his antecedents, as they have been described to us, does not occupy a very high position, was on terms of great intimacy with Allen; that the intimacy commenced at an early period, and was continued during the time of these various transactions and still continues, for it appears that Allen and his children are now residing at Boxell's. Boxell has been in Westminster Hall and in this Court during

the trial, and yet he has not been called before you to give you such information as he might have given upon these matters. It appears also that a person named Gillman, sometimes called Darling and various other names, was an intimate associate of Allen and Boxell; and it is said that Boxell, Gillman, and Allen conspired and acted together for the purpose of procuring an occasion for the adultery of Mrs. Allen; and a person named D'Arcy, who ultimately became the paramour of Mrs. Allen, is introduced as another conspirator; whether he was an active conspirator, or was used merely as the tool of the others, is not put prominently forward one way or the other by the learned counsel. But all these persons are put forward as being engaged in the confederacy, and it is said that D'Arcy was used as the individual who was to lead Mrs. Allen to the commission of adultery. Mary Ann Gully is the first witness as to this part of the case. She says,—"I went to Brighton about the 25th August. D'Arcy was in the habit of visiting them. I never observed any improprieties between him and Mrs. Allen. We occasionally walked out together. Sometimes he walked with me, and sometimes with Mrs. Allen. Mr. Allen was always present. I remember the 31st August." Bear in mind the day, gentlemen. She did not arrive at Brighton until the 25th or 26th, therefore her only acquaintance with D'Arcy was in the short interval between the 25th or 26th and the 30th and 31st.—"Mr. Allen was absent from home on that day. On the evening previous to the 31st, Mr. and Mrs. Allen, D'Arcy, and myself supped at Mutton's, and D'Arcy returned to Allen's apartments. I do not remember anything particular in Mrs. Allen's conduct to D'Arcy. He left about eleven that evening. He was on the same terms as usual with the Allens. The next morning I saw him again at the Marine Parade. When he called that morning, Mr. and Mrs. Allen were at home. Mr. Allen was not at home during the whole of the visit. Mrs. Allen and D'Arcy were together about a quarter of an hour. I remember Mrs. Allen going to London on that day. She started about one o'clock." That is what she says in direct examination, but in cross-examination she gives a more full account.—"I was introduced to Captain D'Arcy a day or two after I got to Brighton. He was on visiting terms with the Allens. They rode out together. D'Arcy did not have more than a meal a day with them. He dined with them about three times during

my visit." (That is, during four days.) "D'Arcy complained of being ill on the evening of the 30th, and either Allen or Mrs. Allen said they had some family medicine, and gave it to him. He left abruptly, and a conversation took place about his doing so. Allen said it was in consequence of some rudeness of Mrs. Allen's. On the morning of the 31st, at breakfast, the subject was again adverted to. Allen said he should go to the Steyne Hotel and see D'Arcy." It is important, gentlemen, that you should bear in mind this expression. If the witness is correct in saying that he used it, it will bear very materially upon the other evidence, because he must have known at the time that D'Arcy was not staying at the Steyne Hotel.—"He went out and came back in half an hour with D'Arcy. He said he had waited whilst D'Arcy wrote two letters and then brought him. I was with Mrs. Allen in her room when Allen came and said D'Arcy was in the sitting-room. He asked her to go down and see D'Arcy. He said he was going out to pay some tradesmen's bills, and she must go down to D'Arcy and apologise." I stop here, gentlemen, to make an observation upon the bearing of this evidence. It is proved that D'Arcy was then staying, not at the Steyne Hotel, but at the Crown, with an intimate friend of Allen's, that Boxell was also a visitor at the Crown, and that Allen knew that D'Arcy was not staying at the Steyne but at the Crown. A letter had come to Allen's house in the morning addressed to Mrs. Allen. You have heard the observations made by the learned counsel who addressed you so ably for the petitioner, as to its being no unusual thing for a husband to break open the seal of a letter addressed to his wife, and then return it unclosed to the envelope and give it to her. You will judge of the weight to be given to those observations, but it does appear an extraordinary fact that he took the letter and opened it in the first instance, and then put it back into the envelope when he saw his wife coming into the room, and handed it to her. If he knew what the letter was intended to convey, this becomes a most material fact. It may be that he was perfectly innocent, and treated it as a matter of indifference and an idle occurrence. But he must have known that D'Arcy was living with his associate Gillman at the Crown, yet he goes out and remains about half-an-hour; he returns to his wife's bedroom, tells her he had waited at the Steyne whilst D'Arcy wrote his letters, that he

was going out to pay his bills, that D'Arcy was down stairs, and that she must go down and apologise for her conduct. It is for you to consider whether a person with any manliness of character would not have felt that he was the proper person to make any explanation that he might think necessary of his wife's conduct, instead of forcing her alone into contact with another man before whom she was to humble herself by making apologies. But it is you, not I, who have to judge of these facts and to draw a conclusion from them. And bear in mind that at the time when this took place Allen knew that his wife was going to London on that day by the ten o'clock train. You must ask yourselves whether he knew from D'Arcy that D'Arcy was also going, for if he did, and there was such a conspiracy as is suggested, he had an additional motive for the line of conduct that he pursued. It may be unfair to draw such a conclusion from the facts proved, but you must exercise your own reasonable understandings upon the matter. It was open to the learned counsel who conducted Allen's case with such ability and ingenuity, to have called Boxell and Gillman, both of whom were in Westminster Hall during the trial, in order that they might have said there was no truth in the suggestion of conspiracy, but they have not been called. You must take that into consideration when you are weighing these various facts. Be very careful before you arrive at a conclusion, but act as reasonable men in weighing the facts and in considering whether you can draw such a conclusion from them as is suggested on the part of the respondent. I was passing over a matter to which I ought to have called your attention when I made the observation about Gillman and Boxell not having been examined. You have evidence before you that D'Arcy was passing by the name of Milburne, and that letters were sent to him addressed to that name, which were handed by the landlord to Boxell, who said "It is all right," knowing for whom they were intended. It is also proved that the letters addressed to Milburne reached D'Arcy, for one letter written by D'Arcy under the name of Milburne in reply to a letter addressed to Milburne, and making an appointment in London for the 31st, was put in evidence. Was it known to Allen that D'Arcy's real name was Milburne, and did he allow him to associate with his wife under the assumed name of D'Arcy and the assumed title of captain in

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order that the prestige of such a name and such a title might the better enable him to carry out his views? The next witness upon this part of the case is William Smith Turner, the landlord of the Crown Inn, at Brighton. He said he knew Allen, Gillman, Boxell, and D'Arcy.—"I remember Gillman coming to my house on the 15th, 16th, or 17th of August, 1858. D'Arcy came a few days afterwards. Boxell visited them, backwards and forwards. Boxell and Gillman had two rooms. They first used the coffee-room, but in five or six days they had a private room. Allen called after D'Arcy came. I think he came three times. D'Arcy left on Tuesday the 30th or 31st. He did not sleep at my house the last night, but called for his luggage on the 1st September. Gillman remained four days after D'Arcy left. D'Arcy ordered two bottles of port wine to be taken to 3, Marine Parade. Boxell asked if there were any letters. I said there was one addressed to Milburne. He said it was all right, and I gave it to him." Then there was the letter to Milburne put in, to which I have called your attention, written by the agent of Hardinge, making an appointment in town for the 31st. Mr. Hollier, the next witness, said he "was the proprietor of the Steyne Hotel. D'Arcy came there on the 1st September. He had not been staying at my hotel on the 31st. He slept there one night and had breakfast the next morning, and a sheet of note paper and an envelope. He wrote his name in the book in case any one called." That book was produced, and you saw by the handwriting that the same individual was D'Arcy and Milburne. Jane Frost, the servant at 3, Marine Parade, said that Boxell and Gillman visited there. Thus they called at Marine Parade as the friends, not of Mrs. Allen, but of Allen. "They frequently visited," says the witness, "but I cannot remember that they dined or took any meals there. After D'Arcy began to visit, Boxell and Gillman did not come as frequently as before." It is important also to bear this in mind, for probably the object was that D'Arcy should not appear to be on friendly terms with Boxell and Gillman. Allen had occupied the apartments nearly a week before D'Arcy called. The transaction only extended over a fortnight altogether, and they left Brighton about the 6th September. Gillman had then been at the Crown for about three weeks; D'Arcy joined him a few days after his arrival. Allen called there to see Boxell and Gillman. This would lead to

the inference, bearing in mind the evidence of Miss Gully, that prior to D'Arcy's visiting Allen's lodging, he had been seen by Allen at the Crown. It is for you to say whether that is a fair conclusion from the evidence. Bear in mind the rule of law that I have laid down as to connivance, and you will have no difficulty in applying it, for this case goes further than mere connivance; the charge, which is unexplained and unanswered except by a letter written by Mrs. Allen in July, being that there was a conspiracy. One further observation before I leave this part of the case. Lewis, the police officer, was employed on the Friday after Mrs. Allen's visit to London to trace out the adultery. Who employs him? Boxell. So that he must have gone up to London on the very day but one after Mrs. Allen's return to Brighton. Miss Gully stated that D'Arcy had made an arrangement to go to the theatre with the Allens on the Saturday, and that on the Thursday, the 2nd September, a letter was received saying that he could not come. Was that the letter written from the New Steyne Hotel? Boxell is the person who gives instructions to the police officer, and these instructions put him immediately on the very trace of the parties. Who gave him the information about the Cadogan Arms and the Gloucester Hotel?

The next question is—Was the adultery condoned? Upon the plea of condonation there is not a tittle of evidence. The moment the proof of the adultery is brought to Allen's knowledge by Lewis and the other witnesses, he at once separates from Mrs. Allen.

The next question that arises is—Did the wife condone the husband's adultery? If there be a voluntary return to conjugal cohabitation, the innocent party agreeing to restore the offending party to the position he or she occupied before the offence, that is undoubtedly condonation in law. There is a difference between the case of a wife and that of a husband in this respect. It may be that the husband is living under the same roof with the wife when she gets the first information of his guilt, and that she has no one at hand to advise her, and has a difficulty in leaving his house, and may be constrained from the necessity of the case to occupy the same bed with him, and yet, looking at all the circumstances, a reasonable man would be loath to come to the conclusion that she had condoned. But if she brings her husband volun-

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tarily back to her house, and they continue to cohabit together, he treating her as a husband, reasonable people on those facts would come to a different conclusion. In this case she brought him back, and they lived together in May, June, July and August, down to the time of the act of adultery complained of, but if anything is wanting in the proof it is supplied by the letter of the 18th July, beginning, "My dearest husband, pray take me out of town somewhere," a request with which he complies. In the same manner she condoned the cruelty charged, for there is no evidence of any act of cruelty by him against her after their arrival at Brighton.

With regard to the cruelty prior to that time, I am bound to tell you as a matter of law, that to support the charge of cruelty, such conduct must be shown by the husband as to create in the mind of the wife a reasonable apprehension of danger to her person. If the treatment complained of has been brought on herself by acts of violence on her part which have provoked her husband to violence, she, being the aggressor, cannot complain of cruelty which is the consequence of her own misconduct. I do not propose to go through the evidence in detail with regard to the acts of cruelty, because undoubtedly if there had not been provocation on her part, there were such gross acts on his part as to amount in law to cruelty; but there is no one case in the evidence from the beginning to the end in which she was not the aggressor, and the aggressor by an act of violence. Sometimes it was by taking the carving knife to him, sometimes by trying to take the poker, at another time by striking him and by throwing her fan at him; and although you may feel a great contempt for a man who has acted in the manner that he has acted, you must proceed according to the rules of law, and if you find that she has by violent conduct brought the treatment she has received on herself, you cannot say she is entitled to set up that treatment as a plea in bar to the adultery she has committed.

You must say, gentlemen—First, are you satisfied that the wife committed adultery? Secondly, are you satisfied that that adultery was connived at by the husband? Thirdly, did the husband condone that adultery? Fourthly, did the wife condone the adultery of the husband? Fifthly, was the husband guilty of cruelty to the wife? And lastly, did the wife condone that cruelty of the husband?

The jury deliberated for a quarter of an hour, and then returned a verdict for the petitioner upon the first, third, fourth, fifth and sixth issues, and for the respondent upon the second, adding that they were unanimously of opinion that there was a base conspiracy against Mrs. Allen.

CRESSWELL, J. O.: Inasmuch as no member of the Court has any doubt of the propriety of the verdict, we feel bound at once to proceed to make a decree in conformity with that finding. The statute under which we sit has pointed out the duty of the Court in cases like the present. The 29th sect. says:—"Upon any such petition for the dissolution of a marriage, it shall be the duty of the Court to satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same, and shall also inquire into any counter charge which may be made against the petitioner."

The Court here was not under the necessity of entering into any such inquiry in addition to the facts alleged, for connivance was one of the allegations on the record. It was therefore submitted to the jury, and has been disposed of by them.

The 30th sect. directs the Court what it is to do when the opinion of the jury is ascertained:—"In case the Court on the evidence in relation to any such petition shall not be satisfied that the alleged adultery has been committed, or shall find that the petitioner has during the marriage been accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then and in any of the said cases the Court shall dismiss the said petition."

The jury being the proper tribunal to determine the issue, directly putting in question the connivance of the husband at the adultery committed by the wife, they have found that he was guilty of connivance, and the Court therefore find in conformity with that verdict, that the petitioner has during the marriage been accessory to or conniving at the adultery of his wife. That being the case they have but one duty to perform, namely, to obey the direction of the Legislature and dismiss the petition. When the petition is dismissed on such a

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ground, the Court cannot possibly do otherwise than dismiss it with costs.

Petition dismissed, with costs.

PROBATE. NOV. 23 and 30.

O'DWYER v. GEAR and Another.

(BEFORE SIR CRESSWELL CRESSWELL.)

O'DWYER *v.* GEAR and Another.

Will of Married Woman under a power.—Renunciation of Executors.—General Administration.

A married woman during coverture executed a will of realty in the exercise of a power. She survived her husband and died possessed of personalty as well as of the realty devised by the will. The executors having renounced, the devisee under the will, who was also one of the next of kin, applied for administration with the will annexed. The Court held that the grant of administration must be general.

Dr. Wambey moved for a grant of letters of administration with the will annexed of the personal estate and effects of Mrs. Mary Ann Parkin, widow, deceased, to her granddaughter Mary Ann Georgiana O'Dwyer, as one of the next of kin and as devisee. The will was made in December, 1844, during the lifetime of the husband of Mrs. Parkin, and disposed of property described as follows: "All messuages, tenements, dwelling-houses, lands, hereditaments and premises whatsoever, and wheresoever situate, of which I shall be at my death seised, possessed of, or entitled to, or over which I shall have any right or power of appointment or testamentary disposition, to the use of my executors in trust."—The executors were John Gear and John Ellis, and they were directed to pay the income of the property to the husband of the deceased during his life, and at his death it was to go to her granddaughter Mary Ann O'Dwyer and her children; and in case Mary Ann O'Dwyer had no children, it was upon her death to be divided between her brothers and sisters as tenants in common and their heirs and assigns. This devise was made in exercise of a power vested in the deceased by indenture of settlement dated the 1st

July, 1859. Mrs. Parkin survived her husband and died at Alton, in Hampshire, on the 13th January, 1858, without revoking or republishing her will, being then possessed of personalty besides the property devised by the will. The executors had been cited to take probate, but did not appear. He referred to the Probate Act, 20 & 21 Vict. c. 77, s. 79 (*a*), and to the Probate Amendment Act, 21 & 22 Vict. c. 95, s. 16 (*b*).

November 30.—Sir C. CRESSWELL: In this case Dr. Wambey last week made an application for administration with the will annexed of Mary Ann Parkin to her granddaughter and next of kin, who is the principal devisee for life named in the will. It appeared to me that the grant could not be made with the will annexed, because the deceased died intestate except as to some real property which she had devised in execution of a power. The will, after reciting the power, gave that real property to two persons as trustees and their heirs, and went on to appoint the two trustees executors in trust of her will, not professing to dispose of any other property. When I expressed that opinion, Dr. Wambey replied by an argument founded on the 20 & 21 Vict. c. 77, and the 21 & 22 Vict. c. 95. I did not at the time see how any argument on those statutes affected the view of the subject which I suggested, but it occurred to me that I might fall into some error and not do justice to the learned doctor's argument, if I did not consider the matter further. I apprehend that the real drift of his argument was this—that the appointment of executors to a will of realty prevented the lady from dying intestate as to personalty, and that perhaps I might be under the mistake of supposing that the renunciation of the executors caused her to die intestate, whereas, if they had been once named there could be no intestacy,—in other words, that the removal of them by renunciation did not so effectually remove them that the will was to be dealt with as if she had never appointed executors. That would be a very good argument if they had been so appointed executors as to prevent an intestacy as to all parts of her property. But the will affected to deal with nothing but realty, and the persons

(*a*) "Rights of an Executor renouncing probate to cease."

(*b*) "An Executor not acting or not appearing to a citation to be treated as if he had renounced."

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appointed executors to it could take nothing at all *jure representationis*. It was decided in *Ingman* v. *Hopkins* (4 Man. & Gr. 400), that the authority of the executors of a will made under a power could not extend beyond that power. In that case, Tindal, C.J., said: "Without entering into the question whether or not the wife had the power of disposing by will of the accumulations of these dividends, it is enough to say that no such disposition appears to have been made in this case; as the will is limited to the proceeds of the Long Annuities when sold, and leaves the prior accumulations untouched. But then it is said that although these accumulations were not disposed of by the wife, yet, executors having been appointed, the law vested the money in them. But the authority of these executors is only co-extensive with the power given by the will, for the executors here do not take *jure representationis*, but under the power which the wife was authorised to exercise by making a will as to this particular property. They are, therefore, not entitled to the money." In this case the personal property was not at all affected by the will, the executors had no interest under the will, they took nothing *jure representationis*, and therefore, as they have renounced, no grant can be made to the administrator with the will annexed. You must take a general grant or none at all. The party can make an affidavit that the deceased made no will except as to this real property.

General administration granted.

PROBATE. DEC. 21, 1859.

In the Goods of the Rev. WILLIAM BREWSTER, deceased.

(BEFORE SIR CRESSWELL CRESSWELL.)

In the Goods of the Rev. WILLIAM BREWSTER, deceased.

Wills' Act, 1 *Vict. c.* 26, *s.* 20.—*Imperfect Revocation.*

A testator having duly executed a will, wrote over his signature the word "cancelled" and his initials, and added a memorandum at the end that he thereby revoked that will and intended to make another, whereupon he would destroy that one, but no other will was found. The Court held that the will had not been revoked in any mode prescribed by the 20th section of the Wills' Act, and granted probate to the executors.

The Rev. William Brewster died at Llandudno in Wales, on

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In the Goods of the Rev. WILLIAM BREWSTER, deceased.

the 22nd October, 1859, leaving a will, of which his father the Rev. E. J. Brewster and Mr. G. Hargreaves were appointed executors. The will consisted of three sheets of paper, and it was duly executed. The testator had signed his name at the foot of each of the three sheets as well as at the end of the will, and after his death it was discovered that he had written over each of these signatures the words "Cancelled, W. B." At the end of the will he also wrote "I hereby revoke this will, and it is altogether cancelled;" and after stating his reason for the intended revocation, added, "I intend to make another will, whereupon I will destroy this." Search had been made, but no other will had been found amongst his papers.

Dr. Middleton moved for probate of this will to the executors.

SIR C. CRESSWELL: The will has not been revoked in any of the modes prescribed by the 1 Vict. c. 26, and I must therefore admit it to probate.

Probate granted.

(BEFORE CRESSWELL, J. O.)

DIVORCE AND MATRIMONIAL. DEC. 21, 1859.

WORTH *v.* WORTH.

WORTH *v.* WORTH.

Dissolution of Marriage.—Amendment of Petition.—Practice.

A petitioner for a dissolution of marriage being unable to trace his wife and the co-respondent, obtained leave to proceed without serving them. Before the case came on for hearing he ascertained that they were living together at Walsall. The Court allowed him to insert additional allegations of adultery in his petition, but rescinded its former order dispensing with service.

This was a petition by a husband for a dissolution of marriage on the ground of his wife's adultery. An order had been made by the Judge Ordinary allowing the petitioner to dispense with service upon the respondent and the co-respondent, who were supposed to have gone to America and could not be found, upon advertisements being inserted in the *Times*

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and *Daily News*. An order had also been made that the cause should be tried without a jury.

Macqueen now moved for leave to amend the petition by the insertion of allegations of adultery at Walsall, in Staffordshire, in August, September, and October, 1859. It had recently come to the knowledge of the petitioner that the respondent and co-respondent had since August been living at that place.

CRESSWELL, J. O.: You must serve a copy of the amended petition and the citation upon them at Walsall, and the order directing the mode of trial must be rescinded.

Application granted.

DIVORCE AND MATRIMONIAL. DEC. 5, 1859.

BELL *v.* BELL and the MARQUIS OF ANGLESEY.

(BEFORE THE FULL COURT:—CRESSWELL, J. O., WATSON, B., AND HILL, J., AND A SPECIAL JURY.)

BELL *v.* BELL and the MARQUIS OF ANGLESEY.

Dissolution of Marriage.—Assessment of Damages against Co-Respondent.—Marriage Settlements.

In assessing damages against an adulterer, a jury is to act upon the same principles as in actions for crim. con. before their abolition by the 20 & 21 Vict. c. 85.

Upon the authority of *Dr. Lardner's case* the Court allowed the jury to take into consideration the nature and effect of the marriage settlements in aggravation of the damages against the co-respondent.

Quære—Whether the 5th section of the 22 & 23 Vict. c. 61, gives the Court power, in suits for dissolution, to deal with marriage settlements when there is no child of the marriage?

This was a petition by James Morton Bell for a dissolution of his marriage with Ellen Jane Bell, on the ground of her adultery with the Marquis of Anglesey. The respondent and the co-respondent put in answers denying the adultery. The petitioner also prayed for damages against the co-respondent, and laid them at £10,000.

The petitioner was a merchant in the City of London, and

the respondent was one of the daughters of Mr. Burnand, a wealthy stockbroker. They were married in July, 1851, and cohabited at Gloucester Terrace, Hyde Park, and sometimes at Worthing, where Mr. Burnand had a house. At the time of the marriage Mr. Bell was 25, and Mrs. Bell 21 years of age. A butler named Wicks, who was in the service of Mr. and Mrs. Bell from 1852 to 1858, proved that from 1854 to 1858 they were visited by the Marquis of Anglesey, who was also intimate with Mr. and Mrs. Burnand; that the Marquis of Anglesey was a widower, and was generally accompanied, when he went to their house, by his son, Lord Berkeley Paget, and his daughter, Lady Florence Paget; and that Mr. Bell appeared to be a kind husband, but he occasionally had slight differences with Mrs. Bell, in which he complained of her seeing too much company. It was then proved by Sarah Densley, formerly lady's-maid to Mrs. Bell, that in Oct., 1858, Mrs. Bell was staying at her father's house at Worthing, and that on the 23rd of that month she eloped, during her husband's temporary absence, with the Marquis of Anglesey, and afterwards lived with him as his wife in London and at Tunbridge Wells.

M. Chambers, Q.C. (*Cleasby* with him), for the petitioner, said that the reason why a prayer for damages had been inserted in the petition, was that Mr. Bell had settled £5000 upon his wife at the time of the marriage, and it was thought desirable that he should be relieved from his liability in respect of that settlement in the event of the marriage being dissolved. The 5th section of the 22 & 23 Vict. c. 61, (*a*) gave the Court power to deal with the marriage settlements of parties after a decree of dissolution, but a doubt had arisen whether that section was applicable to cases like the present, in which there had been no children of the marriage.

Mr. Sewell, an attorney, stated the substance of the various settlements executed at the time of the marriage. It is only

(*a*) "The Court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of a whole or a portion of the property, settled either for the benefit of the children of the marriage or of their respective parents, as to the Court shall seem fit."

material to state that Mr. Bell gave his wife a life interest in £5000 stock for her separate use.

Cross-examined.—The marriage was not a happy or well-assorted one, as it turned out. Mrs. Bell was a lady of considerable personal attractions.

Pigott, Serjt., and *Dixon*, for the respondent.

Edwin James, Q.C. (*Gordon Allan* with him), for the co-respondent, submitted that the Court had power to deal with the marriage settlements notwithstanding there were no children; but if the petitioner did not ask them to exercise that power he no doubt was entitled to ask the jury to give him damages, which would put him in the same position, as to money, as before the marriage. From the little evidence that had been laid before them, the marriage appeared to be an ill-assorted one, and there was no suggestion of deliberate seduction on the part of the co-respondent.

CRESSWELL, J.O., summed up:—Gentlemen of the jury, this is a very simple case; Mr. Bell asks for a divorce by reason of his wife's adultery with the Marquis of Anglesey. Mrs. Bell and the Marquis of Anglesey both deny that adultery on the pleadings, but after the evidence we have heard there can be no doubt that the allegations in the petition are true. The only question that remains is, the amount of damages. At the time when the Act constituting this Court was passed, great objections were made to the old action for crim. con. But there was a difference of opinion on the subject, and it was at last said that it would be reasonable to allow a claim for damages to be introduced as an incident into a petition for a dissolution of marriage or for a judicial separation. But the Legislature were induced to go further, and by the 33rd section of the statute (20 & 21 Vict. c. 85), enacted, that "Any husband may, either in a petition for dissolution of marriage, or for judicial separation, or in a petition limited to such objects only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner;—and the claim made by every such petition shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversa-

tion are now tried and decided in Courts of Common Law;— and the damages to be recovered on any such petition shall in all cases be ascertained by the verdict of a jury, although the respondents or either of them may not appear." If the word "declaration" is substituted for "petition," I do not very well see the difference between a petition confined to a claim for damages and an action for crim. con. There is no substantial difference between them. But the claim for damages in this case comes within the first part of the section, and you are therefore to deal with it just as a jury would have dealt with the old action for crim. con. in a Court of Common Law. And I never remember to have heard even a suggestion, that a jury in assessing the damages in an action for crim. con., could legitimately take into their consideration the nature and effect of the settlements made at the time of the marriage. They had to consider the loss the husband had sustained by being deprived of his wife, not his pecuniary loss.

M. Chambers:—In the case of Dr. Lardner the settlements were put in evidence and £8000 damages were given in consequence. It was urged that an income having been settled on the wife, she would continue to enjoy it, and the adulterer would have the benefit of it. In Buller's N. P. 26, (*a*) it is laid down, that the settlements may be considered by the jury.

CRESSWELL, J.O.: I can understand that it might be a proper topic for an address to the jury, but I cannot understand upon what principle it can be given in evidence.

(*a*) "The action lies in this case for the injury done to the husband, in alienating his wife's affections; destroying the comfort he had from her company; and raising children for him to support and provide for. And as the injury is great, the damages given are commonly very considerable: but they are properly increased or diminished by the particular circumstances of each case; the rank and quality of the plaintiff; the condition of the defendant; his being a friend, relative, or dependent of the plaintiff, or being a man of substance; proof of the plaintiff and his wife having lived comfortably together before her acquaintance with the defendant, and her having always borne a good character till then; and proof of a settlement or provision for the children of the marriage, are all proper circumstances of aggravation. On the other hand proof that the wife had before eloped with others; or that the husband had turned her out of doors, and refused to maintain her, and that he kept company with other women; or that he was acquainted with and consented to the defendant's familiarity with her, is proper mitigation of damages." And Shelford on M. and D. 388.

Edwin James said he was one of the counsel in *Dr. Lardner's case*, and he remembered that the settlements were given in evidence.

CRESSWELL, J.O.: Neither I nor my learned brethren can remember a case in which such evidence was given; but after the precedent which has been cited I will not withdraw the settlements from the consideration of the jury. When a husband has settled a certain amount of money upon his wife to her separate use for her life, it is as much to her separate use when they are living together as when they are living apart. If she chooses to gamble with it, or to make ducks and drakes of it in any way whilst they living together, he has no control over it.

However, gentlemen of the jury, as I am told that the effect of the settlements is a legitimate consideration for you, I will not withdraw the evidence upon that part of the case from your notice.

The usual course in dealing with the question of damages in cases of this kind is, to consider the position in life of the parties, the state in which they were living together before the misconduct of the adulterer disturbed the happiness of the husband, the circumstances under which the adulterer was introduced into the family, and the means he has of paying damages, and not to make the damages penal, but a remuneration or compensation as far as money can be a compensation (and it is a miserable thing to talk of money in such a matter at all) for the injury sustained by the husband. In this case we have little evidence as to the married life of the parties. No person has been called who was intimate with them, and only one gentleman who knew anything about them, and he said it was not a happy marriage. The butler said they had discussions, but not of a serious character; that the husband was kind to the wife, but complained of her propensity to see too much company.

Then what is the evidence with regard to the Marquis of Anglesey? How he became known to the family is not explained to us. For a time, at all events, his daughter was with him at Worthing, where he associated with the Bells and their family. It does not appear that the husband was guilty of any negligence, or that he exposed his wife to temptation by allow-

ing her to associate too much with the Marquis. There is no evidence that anything happened to put him on his guard, and she appears at the time of her elopement to have been staying with her own father and family at Worthing. Therefore, as far as I can see, there is no complaint to be made against the husband for want of due care of his honour, and it does not appear that he was in any way reckless of it. There is no proof of any familiarity between the Marquis and Mrs. Bell which might have raised a suspicion in his mind or caused him to take extra care. But it appears that on a certain day she went from Worthing and took up her abode at an hotel in London, where she was visited by the Marquis daily; that she then went to the Calverleigh hotel at Tunbridge Wells, and that the Marquis lived at the same hotel; and although they had separate bed-rooms, most people of the world would probably come to the conclusion that they were not there for any innocent purpose. They then came to London, where she assumed his name, and they cohabited as man and wife. It is possible that the Marquis, taking advantage of the prestige attaching to his title and his position, might induce a handsome woman, too fond, perhaps of admiration, to lay herself open to his attentions. If you think that he did avail himself of his title and his large possessions to rob Mr. Bell of his wife, and to destroy his honour, you will probably be of opinion that a serious amount of damages should be awarded. You will estimate them upon the same principle upon which juries formerly estimated damages in actions for crim. con.

The jury returned a verdict for the petitioner, and assessed the damages at £10,000.

The Court pronounced a decree of dissolution and condemned the co-respondent in the costs.

Marriage dissolved, with costs against the co-respondent and £10,000 damages.

(BEFORE CRESSWELL, J.O.)

GIBSON *v.* GIBSON.

Restitution of Conjugal Rights.—Judicial Separation.—Right to Begin.—Practice.

A husband prayed for a restitution of conjugal rights. The wife, in her answer, did not traverse the marriage and the refusal to cohabit, but charged adultery and cruelty, and prayed for a judicial separation. The husband denied the charges, and the case came on for trial without a jury. The Court held that the husband must begin by proving the marriage, and the refusal to cohabit.

The petitioner, Charles Gibson, alleged a marriage with the respondent, then Mary Howard Teast, spinster, on the 10th November, 1853, and cohabitation until April, 1859; that the respondent then withdrew herself from cohabitation without reasonable excuse, and although earnestly requested to return, refused to do so; and he prayed for a restitution of conjugal rights. The respondent, in her answer, did not traverse the marriage, and that she had withdrawn from cohabitation, but denied that it was without just cause; she alleged that her husband had been guilty of cruelty and adultery, and prayed that his petition might be dismissed, and that the Court would make a decree of judicial separation, and order the custody of the child of the marriage to be given to her. The allegations of cruelty and adultery were denied by the petitioner.

Sir F. Slade, Q.C. (with him *Dr. Spinks* and *Prideaux*), said that the marriage being admitted, the respondent had a right to begin.

CRESSWELL, J.O.: There are no admissions taken in this Court.

Sir F. Slade: In *Hayward* v. *Hayward* (*a*), and in cases

(*a*) *Hayward* v. *Hayward* was a suit by a wife for the restitution of conjugal rights, and came on for hearing before CRESSWELL, J. O., without a jury, on the 15th

tried before a jury, when the marriage has been admitted, the respondent in a suit who has had to establish the affirmative of the allegations in an answer, has been allowed to begin.

Shee, Serjt., *Dr. Wambey*, and *H. T. Cole*, for the petitioner.

CRESSWELL, J.O.: *Hayward* v. *Hayward* was a suit transferred from an Ecclesiastical Court, and was therefore governed by the practice of that Court. If there is a jury, and the marriage is not in issue, the jury has no power to inquire into the marriage; and according to the practice of the Common Law Courts, the party who has to prove the affirmative of the issues must begin. But where there is no jury, the marriage which is the foundation of the proceeding must be proved in the first instance.

The petitioner accordingly proceeded to prove the marriage, the withdrawing from cohabitation, the request to return, and the refusal. The respondent then called evidence in support of the allegations in her answer, and evidence was called in reply by the petitioner.

The Court dismissed the petition of the husband with costs, pronounced a decree of judicial separation on the prayer of the wife on the ground of adultery, and ordered that she should have the custody of the child.

July, 1858. It was one of the suits which were commenced in the Ecclesiastical Court, and transferred to this Court.

Slade, Q.C. (*Dr. Addams*, Q.C., and *W. Cooper* with him) for the respondent: The fact of the marriage being admitted in the pleadings, we must show your Lordship reasonable ground for the separation.

CRESSWELL, J.O.: I should have thought the wife must begin, but the case must be conducted according to the practice in the old Courts.

Dr. Addams: It sometimes happened in a suit for restitution of conjugal rights that the husband confessed the marriage, but contested the prayer of the petitioner, and then he became the complainant to all intents and purposes.

Dr. Phillimore, Q.C., and *Dr. Waddilove* for the petitioner.

CRESSWELL, J.O.: I must be guided in this case by the old practice.

The case was accordingly opened by *Slade*.

See *Cherry* v. *Cherry*, 1 Sw. & Tr. 319; and 28 L. J. P. & M. 36.

(BEFORE CRESSWELL, J.O.)

SOPWITH *v.* SOPWITH.

Judicial Separation.—Direct Evidence of Adultery.—Employment of Private Detectives.

In support of a petition by a wife for a judicial separation, direct evidence was given of several acts of adultery committed by the husband; but in consequence of the improbability of that evidence, of the discrepancies in the statements of the witnesses, and of the improper manner in which it had been got up by the private detectives employed by the petitioner, the Court refused to act upon it, and dismissed the petition.

The petitioner, Matilda Sopwith, alleged a marriage with Henry Lidsell Sopwith, in June, 1857, and cohabitation until May, 1858; and charged him with divers acts of adultery with Mary Ann Prickett in 1858 and subsequently, and prayed for a judicial separation. The respondent pleaded a denial of the adultery charged.

Mr. Sopwith was a surgeon, who had practised at Tunbridge Wells for 25 years. At the time of his marriage with the respondent he was a widower, his age being about 50; and he had a daughter residing with him who had attained her majority. The petitioner was 35 years of age: she was the daughter of a Mr. and Mrs. Deane, and she made the acquaintance of Mr. Sopwith in 1856, when she was staying with her father and mother at Tunbridge Wells, through his attending her in an illness. After the marriage, Mr. and Mrs. Deane continued to live near them at Tunbridge Wells, and they were all for a short time on friendly terms. In the course of a few months complaints were made by Mr. and Mrs. Deane that Mr. Sopwith did not pay sufficient attention to his wife, and by Mr. Sopwith that Mr. and Mrs. Deane did not treat him with proper kindness and respect. On the 18th of May, 1858, Mrs. Sopwith, with her husband's sanction, accompanied Mr. and Mrs. Deane to Cheltenham to stay for a few days, and the following day she wrote to him in affectionate terms, giving an account of her journey and of the place where she was staying. He returned an answer, also in affectionate terms, but referring

to the conduct of her father and mother, and mentioning one or two particulars of their behaviour to him, of which he thought he had a right to complain; and he said, "I shall, on your return, expect you not to visit them nor they you." Mrs. Sopwith in her reply accused him of want of affection in wishing to deprive her of the society of her parents, and suggested a separation. Some further correspondence passed, and Mrs. Sopwith never returned to her husband's house. With the sanction of her father and mother, she engaged a private detective named Shaw, and afterwards another named Topp, to make inquiries at Tunbridge Wells with respect to Mr. Sopwith's mode of life; and in consequence of the evidence they collected the present petition was presented in June, 1859. The person with whom the adultery was charged to have been committed was a young woman of 24 years of age, who went into Mr. Sopwith's service at the age of 14, when his first wife was alive, and remained in it until May, 1857, with the exception of two years, when she was obliged to stay at home from ill health; who then came to London to assist in carrying on a millinery business, and returned to Tunbridge Wells in January, 1858, in order to see her father before he died, and remained there and re-entered Mr. Sopwith's service.

Dr. Phillimore, Q.C., and *Dr. Spinks*, for the petitioner; *K. Macaulay*, Q.C., and *Dr. Wambey* for the respondent.

All the material parts of the evidence are stated in his Lordship's judgment.

December 24.—CRESSWELL, J. O.: This is a case of very great importance; perhaps of more importance to one of the parties than to the other, and I have considered it with much anxiety. Last night, after the bulk of the evidence for the petitioner had been given, I examined it carefully, minutely, and I hope dispassionately; and having now heard the evidence on the other side, and the very able addresses of the learned counsel, I have formed a very decided opinion upon the case, and I think I am bound to express it at once, without going through the form of taking time to re-consider it.

The case is an unhappy one. It appears that Mr. Sopwith was married in 1857; that in 1858 his wife's father and mother were residing at Tunbridge Wells, and that an estrangement

arose between him and his wife and her parents. The estrangement appears to have been carried to much greater lengths between Mr. Sopwith and the father and the mother than between him and his wife; and it is possible that a little more consideration and conciliation on the part of Mr. and Mrs. Deane would have prevented his parting with them upon bad terms when his wife went with them to Cheltenham, and the unfortunate discussion about a separation that followed would never have taken place. That discussion, however, did take place, and Mr. and Mrs. Deane and Mrs. Sopwith being all arrayed hostilely against Mr. Sopwith, began to cast about for some explanation of his apparent coldness towards his wife. Naturally enough, they hit on the idea that he preferred some other woman; and accordingly one Shaw, a professed discoverer of mal-practices of that sort, was employed to find out, if he could, some delinquency on the part of Mr. Sopwith. No suggestion was made from the beginning to the end of the case that the least suspicion existed in their minds, or that there was the slightest foundation for any suspicion against Mr. Sopwith up to that period. Mr. Deane's statement upon this point appeared to me so extraordinary, that although I believed I had accurately written upon my notes the date he gave for the employment of Shaw, I could not persuade myself that I had not been mistaken; but when I questioned him to-day he repeated that his daughter told him as early as August, 1858, that she had communicated with Shaw. Shaw, a person professionally employed in such matters, was at work from August, 1858, to June, 1859, without producing any result at all.

I feel bound here to make one or two observations upon the subject of the employment of men of the class to which Shaw belongs. They may be very useful for some purposes—they may be instrumental in detecting mal-practices which would otherwise remain concealed, but they are most dangerous agents—I say it advisedly, it is my opinion that they are most dangerous agents. Police detectives are most useful; they are employed in a government establishment, they are responsible to an official superior, they have no pecuniary interest in the result of their investigations beyond the wages they receive for the occupation that they follow, and they may be and are constantly employed, not only with safety, but with benefit to the public. But when a man sets up as a hired discoverer of

supposed delinquencies, when the amount of his pay depends on the extent of his employment, and the extent of his employment depends on the discoveries he is able to make, then that man becomes a most dangerous instrument.

Shaw not having been sufficiently clever, or sufficiently vigilant, another person was set to work to make discoveries; and that man, Topp, appears to have been entrusted by the attorney for the petitioner to do that duty which properly belonged to the attorney. He has had the seeking out of all the witnesses; he has had communications with them again and again, three or four times repeated; and it is not until the last moment, after the briefs have been prepared, that the attorney's clerk sees and examines them. I trust the time is far distant when professional men, educated for their profession, and admitted on the rolls of the Courts, to which they are responsible for their conduct, will abandon their proper functions into the hands of such persons as appear to have been engaged in getting up this case.

What is the result? A young woman was living in Mr. Sopwith's service, who had been acquainted with him from childhood. She had gone a second time into his service, having left it two or three years before, after she had grown up to woman's estate in it. Her parents were living some three miles beyond Tunbridge Wells. During the two years that she and Buss (*a*) were together in Mr. Sopwith's service before his marriage, all that Buss can prove is that he saw Mr. Sopwith kiss her once. With that solitary exception, there is not, up to the period when she went to London, one iota of evidence of any description upon which it would be possible to found even a surmise of anything like familiarity between the master and the servant. Bear in mind, too, what sort of a person Buss was. He was a man apt to look through keyholes; a man of prurient imagination; a man desirous of seeing indecencies whenever he had an opportunity. Do you think that if he had had the least reason to suspect improper familiarities between his master and his fellow-servant, he would not have watched them incessantly; and that if he had seen anything of the kind, he would not have com-

(*a*) Buss was a coachman, who had been in Mr. Sopwith's service from June, 1855, to April, 1859, and who gave evidence of improper familiarities that he had seen between Mr. Sopwith and Mary Ann Prickett, at different times in the early part of 1858, by looking through a keyhole in Mr. Sopwith's office.

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municated it to Topp? But during two whole years they must have been either so abstinent, or so sly, that a servant so curious as Buss never, with one exception, saw anything improper in their conduct. In May, 1857, the girl left his service and came to London; and what reason is there to suspect any misconduct in London? Did they ever trace Mr. Sopwith to London? What could have led them to surmise for a moment that he had ever come to London to see her? There is not a particle of evidence upon which such a surmise could be founded. A story appears, however, to have been got up at a late period of the case connected with this visit to London. A young woman having been delivered of a child near Tunbridge in January, 1858, who was to be identified with Mary Ann Prickett, it was found necessary, upon a calculation of the time, to send him to meet her in London, in order to make out that he was the father of the child (*a*). How did they get hold of the story of this child? Who suggested or surmised that the young woman was Mary Ann Prickett? What inquiries were made on the subject, and to whom? Of this there is no explanation. In support of that part of their case, they bring up to London a Mrs. Wilson, I suppose a respectable woman, who is to prove, if she can, that Mary Ann Prickett was Henrietta Pearce. But the night before the cause is heard, Topp hurries down to Tunbridge, and brings up Mrs. Wilson's daughter to be examined in support of the identity instead of the mother. Why? Can there be the least doubt that it was because the mother said she could not speak to the identity? The daughter is put into the box, and hesitates in such a manner as to leave considerable doubt upon the mind of every one who hears her as to the identity

(*a*) Elizabeth Wilson, a milliner, living near Tunbridge, proved that in February, 1858, a young woman, who gave the name of Henrietta Pearce, took lodgings in her house, and had a child there; that she went afterwards to Tunbridge Wells, and that Mr. Sopwith frequently visited her, and paid for the medical attendance. On cross-examination she said that Topp had brought her to London the night before the hearing of the cause, and that her mother had come to London before; and when Mary Ann Prickett was brought into Court and shown to her, she said she was the person who had passed as Henrietta Pearce, although she was now rather thinner. On the part of the respondent the medical man who had attended Henrietta Pearce, and Henrietta Pearce herself were produced, and it was so clearly proved that she and Mary Ann Prickett were different persons, that *Dr. Phillimore* gave up that part of his case.

she is called to prove. Why was not the mother put into the box? Mr. Sopwith had a right to call for her evidence, that she might either confirm or contradict her daughter. He had a right to have the benefit of her opinion as to whether her daughter was right or wrong; and, after the equivocal evidence of the daughter, I cannot approve of the not calling her. So much for that part of the case.

Then there is the evidence of Miss Bott as to what took place in London (*a*). It appears from Miss Bott's evidence, that although previous to the visit to London there had not been the slightest familiarity observed between them, except the solitary kiss spoken to by Buss, that she had received valuable presents from him, and kept two photographs of him, so much was she in love with him. Miss Bott has sworn to a good deal on this subject, but it has all been denied by Mary Ann Prickett. It is said, and truly, that she is in the position of a *particeps criminis;* that she is swearing to relieve herself from a foul charge; but that of itself is not a reason for disbelieving her. She gave her evidence as modestly, as plainly, as firmly, as any witness that I ever saw examined. Her appearance and demeanour were singularly in her favour. She denied the whole story about the watch and the presents, and said she knew nothing about it; but that the story about the photographs might possibly be explained by the circumstance that her sister had a lover, whose photograph might have been produced to Miss Bott. Whether Miss Bott imagined, or has been persuaded, that she saw the photograph of Mr. Sopwith, or whether she has wilfully, for some reason or another, sworn what is not true, I cannot tell. But she has sworn something that is incredible and utterly absurd. She has said that Prickett told her she was going to marry the Doctor (now the Doctor then had a wife living, whom he had married in the preceding May), but she could not marry him

(*a*) Miss Bott was a milliner, who had worked for Mary Ann Prickett when she lived at Islington, in 1857. She was called, in reply, by *Dr. Phillimore*, and said that Mary Ann Prickett wore a gold watch and a chain and a cameo brooch, which she said had been given to her by Mr. Sopwith, that she had stated that she was going to marry him when some money matters were settled, that she frequently received letters which she said were from him, and sometimes went out, saying she was going to meet him, and that she had two photographs of him, which she showed to the witness. To all these statements Mary Ann Prickett in her cross-examination had given a positive denial.

until some money affairs were settled. Why should she, knowing that he was just married, tell Miss Bott that he was going to marry her? There was some contradiction as to the extent of the correspondence between her and Mr. Sopwith when she was in London. Miss Bott said she received several letters, and she told her she had heard from Mr. Sopwith two or three times; and sometimes when she went out, she said she was going to meet him at the London Bridge Station. One of these instances she mentioned with great particularity; and the account given by Prickett fully explains it. Prickett was asked whether she wrote to the Doctor, and she said—"Yes. During my father's illness I wrote to him once to ask about my father. He wrote back to say, that my father would never get well again; and then I went home." Miss Bott said that she received a letter; that she said it was from the Doctor; that it was the last letter she ever received from him; that she said she must go to meet him at the London Bridge Station; and that she went away, and did not come back. If we only leave out the circumstance that she said she was going to meet the Doctor, which Miss Bott may easily have had put into her head, her account will tally exactly with the fact that Prickett did go home at that period to attend her dying father. The mother might have been asked whether her daughter ever had a watch and chain, and whether she had ever seen photographs, &c., in her possession; but she was not. So much, however, for that part of the case.

She then went back to her home, and lived with her mother and sisters until their removal to Tunbridge Wells. They earned their living—the mother by working for a draper's shop, and the daughter, by working as a dressmaker when she could get employment; and at other times by assisting her mother. After some time, she went again into Mr. Sopwith's service. But before coming to that, let us see what is the evidence of Buss as to this part of the case. He describes her as going to Mr. Sopwith's house very often. This was after his marriage. "When she came of an evening," says Buss, "Mr. Sopwith most times opened the door to her, and then she most times went into the registry-office. She went in, and he accompanied her." Some stories that are told in courts of justice are all truth, and some are all falsehood; but others are a mixture of truth and falsehood; upon a small basis of truth a large super-

structure of falsehood is raised. Prickett says she was in the habit of doing some writing, amongst other things, for Mr. Sopwith. It was very natural that she should, for he had no clerk, and he kept a register of births and deaths. She was employed to make the duplicate of that register; and when she took it from his house in a morning to copy, she was always obliged to take it back the same evening. "I used," says Buss, "to go and peep at the keyhole when they were together. I have seen Prickett sitting on the Doctor's knees and his hands up her clothes. Afterwards a cork was put in the keyhole." The explanation offered by *Mr. Macaulay* as to this cork is, that a surgeon who must necessarily make examinations of some of his patients in his surgery, and who had a curious servant in his house, would naturally stop up the keyhole of the surgery; and he suggested that Buss might have been found looking through the keyhole when Prickett was there. However, the cork was put there, and the witness Allchin (*a*) gave a very material piece of evidence about it; for she said "I once took it away and afterwards found it replaced." Now, if the Doctor had put in the first cork to prevent the curious eyes of Buss from seeing what went on in the room when Prickett was there; and if he had found that cork removed, he would have had cunning enough only to use the second cork from time to time as he wanted it. His leaving the second cork in the keyhole is a pretty strong piece of evidence that he was not conscious of having aroused the suspicion of his servants by its use.

I now come to a very important part of the evidence, as to what took place on the club-night (*b*). Buss describes his master going to the club on that night, and his slipping under the table to avoid his notice, and getting home before him. He says that he then got over some premises adjoining his master's house, from which he could see his master come

(*a*) Harriet Allchin had been in Mr. Sopwith's service from Dec., 1857, to June, 1859; and she was called to corroborate Buss's evidence as to Mary Ann Prickett's frequent visits to Mr. Sopwith's house.

(*b*) Buss said that the 29th June, 1858, was the Odd Fellows' club-night; that he was at the club when he saw his master coming; that he slipped out of the house to escape his notice, and went home to see if any one had called, and he had been wanted during his absence, and that he then watched for his master's return home, in order that he might go back to the public-house, and saw the transaction to which his Lordship alludes.

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home, in order that he might then go back again to the public-house. "I had not," he says, "been there long, when I saw Mr. Sopwith walking up the Parade alone. He looked all round to see whether there was any one about. A short time afterwards Prickett followed him up the Parade. They both went into the house by the front door. The house was in darkness. I think there must have been candles in the dining-room, for after they went in I saw a light at the window. I saw the light go up-stairs. I saw Mr. Sopwith go up-stairs. I could not see him distinctly, but I saw his figure through the blind, which was down. I cannot tell who went up with him, but I saw two shadows. I moved down a little further to where I could see Mr. Sopwith's bed-room window. I then saw what appeared to be two shadows of persons taking off their clothes, and afterwards the light was put out. One shadow appeared to be that of a lady, the other that of a gentleman." The light must have been placed in a most favourable position for the observations of Buss, if he was able to see all that he has described. When I heard the story yesterday, I felt such a great degree of doubt as to its truth, that I should never have felt justified in acting judicially upon it; to speak plainly, I did not believe it. Prickett has now given her account of the transaction. Possibly some one had told her what Buss had sworn, but she did not flinch from the truth; she said—I was at Mr. Sopwith's house on the club-night, and he did let me in. Now, if a witness is disposed to swear falsely, that witness may as well swear falsely to one thing as to another. If she had made up her mind to swear falsely, why should she not have sworn she was not there at all on that night? Instead of that, she says, "There is a certain amount of truth in Buss's statement. I was at Mr. Sopwith's house at an unseasonable hour (half-past ten) on that night. But I went there because my grandmother was ill, and required some medicine. I ought to have gone earlier, but I had been enjoying a frolic at the club, and that is why I was so late." It is a monstrous supposition that this man, with a grown-up daughter in his house, took a prostitute home to sleep with him, with the certainty almost that detection must follow the next morning from the curiosity of his servants. The dose is too strong a good deal for me to swallow, although it is administered by a witness on his oath. I do not believe the story. Buss was then asked whether he

had seen them walking together. He said he had, and that when he had so seen them, Henry Diggens was with him. There is an omission in this part of his evidence that I think is not immaterial. He did not say a word about Mr. Sopwith's visits to old Mrs. Prickett's house, not a syllable about his being in the habit of attending her and the children when they were ill, or about his being driven there in his carriage, and keeping it waiting at the door until he came out. That would have borne too much the appearance of the innocence of Mr. Sopwith, and I believe that if the man had meant to tell the truth fairly, he would not have omitted to mention it. Whether the person who took down his evidence thought he had heard enough when he had got so far, and that it was not necessary to have the rest, I need not stop to inquire; but I cannot believe that man's story. He was asked about various interviews that he had at different times with Topp. What were they for? Why could he not tell at once all that he knew? He was asked, whether he remembered Topp saying to him, "Stick to us, and we will pay you better than the other side." He positively denied that Topp said anything of the kind to him, but the landlord of the house where they were drinking positively affirms that he did, and Topp has not been called to contradict it. I think that neither a solicitor, a solicitor's clerk, nor any one else, is justified in attempting to influence a witness by telling him that it will be more to his advantage to adhere to one side than to another.

The next witness, Mrs. Allchin, proves nothing but the greediness with which she seems to listen at doors and to look through key-holes. She said, "Mr. Sopwith repeatedly let Prickett in of an evening. He told me and the other servants, that if we were out of the way he would answer the door after a certain hour." He did not send them out of the way, but said that if they were out of the way they need not trouble themselves to answer the door. She did not always see Prickett go in, but she fancied she knew her step as she crossed the hall, by her military heels. She could not tell how long she generally stopped; perhaps it was half-an-hour. "I never," she says, "saw any familiarity between them." Depend on it, that a woman like this, to whom key-holes were attractive, would have discovered familiarities if there were any to discover.

I come now to the Chatfields, whose evidence is of a most extraordinary character (*a*). Emma Chatfield says. "The Pricketts lived next door to me in 1858. I went once to their house and met the Doctor coming out." Mrs. Prickett, as well as her daughter, swore that Mrs. Chatfield was never in the house but once. "I went into the house after he had gone out, and saw Mary Ann come downstairs with her dress unfastened and her boots off." This is utterly and absolutely denied by the mother and daughter. She afterwards said, for another purpose, that besides Mary Ann, her mother and her sister Adelaide were there, so that there would be no mistake as to the time. It turns out that there were only two bed-rooms in the house, and this fact has an important bearing upon another part of the case; because if Mrs. Chatfield's account is true, it tends to prove that the presence of the mother and sister in the house was no impediment to the intercourse between the Doctor and Mary Ann. Mrs. Chatfield's husband, Abel, went a great deal further, for he said the Doctor was in the habit of going to the house, and walking straight up-stairs to Mary Ann's room, as if there had been a room for Mary Ann separate from the rest of the family, to which the Doctor might resort. In order to show that the Doctor was constantly at the house, Chatfield stated a fact of some importance, namely, that he went there at all hours of the day sometimes in his chaise, sometimes on foot; and he added, that he walked up directly to Mary Ann's room, and after he had stayed half-an-hour or an hour, went away. He was asked about the habits of Mary Ann. "Oh," he said, "when she went out to meet the Doctor she always put on all her finery." How did he know when she was going out to meet the Doctor? This shows the anxiety of the witness to say the utmost that could be said against her. He added, that he had seen the Doctor coming out of the house as early as six o'clock in the morning. He gave 1858 as the date of that circumstance, but could not tell at what time of the year, and it was not until after much pressing that he fixed it upon one summer morning when he

(*a*) Mr. and Mrs. Chatfield lived next door to Mrs. Prickett, at Tunbridge Wells, and they were called to prove the frequent visits of Mr. Sopwith to the Pricketts. They said that their children and some of Mrs. Prickett's children had had a quarrel, that some words had passed about it, and that they were not on very good terms.

and his wife were standing together at the door. Now it is utterly incredible that both of these witnesses spoke the truth, for Mrs. Chatfield said nothing about that circumstance, and the omission is not one which can be regarded as an index of truth; the fact, if it existed, was far too important to have escaped the recollection of an honest and truthful witness.

The next witness, Diggens, speaks to this remarkable occurrence (*a*): About 11 o'clock one night last year he went towards some furze bushes near the town: he saw Mr. Sopwith and Prickett sitting on a faggot, and he heard Prickett make a very lucky speech, which prevented any surmise that he might have been mistaken in their persons by reason of the darkness; he heard Prickett say "Mr. Sopwith, it is the first time I was ever called a liar by you." Being himself a profligate sort of man he was not unwilling to detect profligacy in others, and no doubt was pleased at finding two people in an indecent position. To make it certain that Mr. Sopwith was one of them, the woman called him by his name;—there are some accidents that are too fortunate and thereby fail in producing the effect for which they were intended. Whether this story has any foundation of truth I cannot say, but it is marvellously like an untrue story for this reason; when he was questioned about the manner in which the couple went to the place where he saw them, he said the girl came out of the Doctor's house, and walked in the direction of the furze, that then the Doctor came out and walked in the same direction, that he did not lose sight of the girl, and that Buss was with him. Did Buss see any such suspicious transaction as is described by Diggens? If he did, is it likely that a man of his tastes, fond of peeping through keyholes, would not have gone a little way with Diggens to see what these two persons were about? But the pith of the matter is, that Buss and Diggens do not give the same account: their tales do not agree. It is possible that Diggens, as he was roving about, did see some indecencies such as he described, and that for some motive, that we need not go far a-field to search for, he was induced to ascribe them to Mr. Sopwith. It is possible that since these

(*a*) Diggens, a plumber and painter at Tunbridge Wells, and a friend of Buss', proved that one night in the spring of 1858 he had seen some indecent familiarities between Mr. Sopwith and Mary Ann Prickett, in some furze bushes near a stone-quarry, not far from Mr. Sopwith's house.

inquiries were set on foot, rumours have been circulated about Tunbridge Wells, and the man has given names to people that he never gave names to before. But the story, as he told it, is so improbable that, contradicted as it has been, I certainly cannot act upon it. In order to ascertain whether there was any mistake about the time, I put several questions to him, and he said at last, that he never saw them walking together except on that night. Before parting with Diggens let me make a remark that naturally arises out of this evidence. If Mr. Sopwith was in the habit of going openly to Prickett's house to have illicit intercourse with her at all hours of the day and night, of leaving the house at six o'clock in the morning, of being with her morning, afternoon, and evening; if she was in the habit of going constantly to his house and of shutting herself up with him in his office; what could have induced them to walk out of his house one after the other, and go to this wood for the purpose of having their enjoyment? There is something so preposterous and absurd in the story, that I should require a vast deal more evidence, and from more respectable witnesses than I have had before me, before I acted upon it.

Then there is the evidence of George Armstrong, apparently a very decent boy, between fifteen and sixteen years old, and certainly a much better witness than Diggens. He said he was going through the wood on an errand for his mother one night in April when he saw Mr. Sopwith; that Mr. Sopwith saw him and stopped, so that he passed him; that he then got behind some furze. Why did he hide behind the furze? Had he heard any rumours about Mr. Sopwith? Had idle people told him tales? Had he heard it said that Mr. Sopwith did not go to Prickett's house for nothing, that his carriage did not stand at her door so often for nothing, that she did not make frequent visits to his house for nothing? He was prepared to expect to see something, and he therefore got behind the furze. He says that Mr. Sopwith came into the wood and coughed twice loudly, that Prickett came out and met him, and they walked together, talking, towards the place where he was standing until they saw him. They knew, therefore, that they were observed, but what did they do? Why, they went into her mother's house, which was close to the lodge. Knowing that they had been discovered in an improper position, they walked together before his eyes into her mother's house. In

one of the first cases I ever heard tried, I remember that half-a-dozen witnesses swore point blank to something that they said they had seen, but the learned judge told the jury—"it is not enough that witnesses should swear to that which is possible; the least we can expect is that they should swear to something that is rather probable." Armstrong further states that about a week afterwards he was again in the wood, when he saw a man go into the lodge opposite Prickett's house, and Prickett then came out and went also into the lodge. (*a*) But why should they go into the lodge opposite the house instead of into the house? It is possible that this lad, who was very young at the time, may have seen some man go into the lodge and some woman follow him, that he may have seen some indecency such as he describes, and some names may have afterwards been put into his mouth, and for aught I know he may believe that the persons he saw were the parties whose names he has used. But the character of a decent man would be in much peril if on such testimony as this, and contrary to all probability, the Court could arrive at the conclusion of his guilt. A vast deal of the evidence against Mr. Sopwith I throw overboard without any hesitation as unworthy of credit. What is the evidence on the other side? The people of the house to which he is said to have resorted so often give an account of the occasions on which he went there. The young woman with whom he is alleged to have committed the adultery has been exposed to the test of cross-examination, and has undergone it very satisfactorily, and she gave a reasonable account of the cause of her visits to his house. Comparing their evidence with that of the witnesses for the petitioner, and thinking that the case of the petitioner has been entrusted to hands that ought never to be employed in preparing cases of this kind for trial, I am not at all satisfied that the petitioner has established such a case as she was bound to establish against the respondent in order to entitle her to a decree. I therefore dismiss Mr. Sopwith from the suit, and he must be indemnified against the costs.

Dr. Phillimore: A sum has been deposited in the Registry as security for the wife's costs.

(*a*) Armstrong spoke to an act of adultery committed on this occasion in the lodge.

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CRESSWELL, J.O.: I find I cannot condemn the petitioner in costs. It is very hard upon Mr. Sopwith, but he must suffer. (*a*)

Petition dismissed.

PROBATE. JAN. 11, 1860.

In the Goods of WILLIAM FAIRLIE CUNNINGHAM, deceased.

(BEFORE SIR CRESSWELL CRESSWELL.)

In the Goods of WILLIAM FAIRLIE CUNNINGHAM, deceased.

Probate—Re-Execution—Attestation.

A testator having made some alterations in a duly executed will, he and the attesting witnesses traced their former signatures with a dry pen, and the attesting witnesses placed their initials in the margin opposite each of the alterations. The Court refused to regard the initials in the margin as evidence that the alterations had been duly executed and attested, and declined to grant probate of the will with the alterations.

William Fairlie Cunningham, formerly of Brompton, and of Chiswick, died on the 13th June, 1859, leaving a will, which had been duly executed on the 2nd April, 1859. After the execution it was discovered that the Christian names of his brother and sister were incorrectly spelt in the will, and also that an error had been made in the Christian name of one of the executors. The testator sent back the will to his solicitor to make the neccessary corrections, and on the 7th April the will was returned to him, and he re-executed it, as he supposed, by tracing over his former signature with a dry pen in the presence of the two attesting witnesses. The attesting witnesses also traced over their former signatures with a dry pen. Opposite the alterations, in the margin, there were the initials of the attesting witnesses.

Dr. Wambey moved for probate of the will with the alterations, and submitted that, although the tracing the signatures with a dry pen did not amount to a re-execution or a re-attestation, yet that the initials of the attesting witnesses opposite the

(*a*) See *White* v. *White*, *ante*, 83.

alterations was evidence from which his Lordship might infer that the testator had acknowledged his signature to the will so altered, in the presence of the persons whose initials were appended to the alterations.

SIR C. CRESSWELL: The initials were not written there *animo attestandi.*

Dr. Wambey: They were written *animo attestandi* as to the alterations.

SIR C. CRESSWELL: But not as to the testator's signature. Mere initials in the margin would not be sufficient as an attestation of a testator's signature without an attestation clause at the end. It is clear they were not put there *animo attestandi.* It cannot be too well understood that tracing with a dry pen is not equivalent to a signature.

Motion refused.

(BEFORE CRESSWELL, J. O.)

SCOTT *v.* SCOTT.

Judicial separation.—Cruelty.—Drunkenness.

In support of a petition by a husband for a judicial separation on the ground of cruelty, it was proved that the respondent was a woman of very drunken habits, and when drunk, abused and threatened her husband. Several acts of violence were also proved, but none of them were committed immediately before the separation. The Court being of opinion that the real object of the husband was rather to get rid of a drunken wife than to obtain protection from her violence, dismissed the petition.

John Scott prayed for a judicial separation from his wife, Lucy Scott, on the ground of her cruelty. The respondent did not appear.

The petitioner stated that he was a cigar-maker's foreman, and lived at Finsbury. He was married to the respondent in

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1840, and they had had two children. She was accustomed to get drunk, and led him a life of misery. She made an attempt upon his life about twelve months ago. She was drunk and he told her of it; she denied it, words followed, and she took up a knife and raised her hand to throw it at him. His son caught hold of her arm and prevented her. They slept together that night and for several months afterwards. She had committed a great many acts of violence before that. She had struck him on the arm with a poker, and had thrown a glass tumbler at him, but it did not strike him. About nine months ago she bit a piece out of his arm. He separated from her in August, 1859. The last act of violence was committed a short time before the separation. She then threw some stones and fossils at him, but they did him no harm.

A man named Macdonald who had lodged in their house corroborated the petitioner's statement as to the violence of the respondent, but said he had ceased to lodge with them in January, 1859.

Jane Scott, the daughter of the petitioner and respondent, said she saw her mother strike her father with a poker. She thought that was about the 31st of June last. On the 24th of July she left their house on account of her mother's cruelty, and went into a situation as governess.

Thomas Scott, the son, said, that his father left the house at Finsbury in consequence of the respondent's drunkenness, and went to Islington where he had since lived. He could not remember anything as to her conduct during the two or three months before the separation, except bad words and drunkenness. Nearly every time when she was intoxicated she used to tell his father that she would do for him one day or another, and his father was afraid of her.

W. Brandt, for the petitioner, submitted that the evidence established that further cohabitation with the respondent would be dangerous to the petitioner and his children, and he was therefore entitled to a decree.

Cur. adv. vult.

January 11.—CRESSWELL, J.O.: Having carefully considered the evidence, I think I must dismiss this petition. No doubt the respondent is a drunken profligate woman, likely to

make her husband's house very miserable. But I cannot avoid seeing that the real ground of this application for a judicial separation is that the husband wishes to get rid of a drunken wife; and I must be cautious about opening the Court to cases of that description. The wife may have an unruly propensity in her drunken fits to destroy property, but there is no evidence of such *sævitia* as would justify me in decreeing a judicial separation.

Petition dismissed.

(BEFORE CRESSWELL, J.O.)

HAYWARD *v.* HAYWARD.

Restitution of Conjugal Rights—Compromise—Costs.

At the hearing of a petition by a wife for a restitution of conjugal rights, counsel, with the assent of the petitioner and respondent, agreed to a compromise, but the petition was not dismissed. The wife afterwards refused to be bound by the compromise, and insisted on proceeding with the suit. An application being made on the part of the wife for the taxation of her costs in the usual manner, the Court refused to allow them to be taxed beyond the date of the compromise.

This was a petition by a wife for a restitution of conjugal rights. The husband pleaded that he had not separated from his wife without reasonable cause. The suit was commenced in the Consistory Court of London, and was transferred to this Court. It came on for hearing before the Judge Ordinary without a jury on the 15th July, 1858 (*a*). Before the case was opened, *Dr. Phillimore*, Q.C., and *Dr. Waddilove*, who appeared for Mrs. Hayward, and *Slade*, Q.C., *Dr. Addams*, Q.C., and *W. Cooper*, who appeared for Mr. Hayward, agreed to a compromise, with the sanction of their respective clients, and the hearing did not proceed, but the petition was not dismissed. Mrs. Hayward afterwards refused to be bound by the compromise, and insisted upon proceeding with her

(*a*) See 1 Sw. & Tr. 333.

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petition. The Judge Ordinary, upon an application being made on the part of Mrs. Hayward to have the cause set down for trial, held that she had a right to have the petition heard, as it remained on the books of the Court, and an order was made accordingly. Mrs. Hayward was subsequently confined in a lunatic asylum, and the cause remained in abeyance until her discharge.

Dr. Waddilove now moved that the costs of Mrs. Hayward might be taxed. Her legal advisers had done all they could to settle the matter, but they had entirely failed, and they had now no option but to proceed. (*Filer* v. *Filer*, 1, Deane & Swaby, 176.)

Sir F. Slade, Q.C., (*W. Cooper* with him) for Mr. Hayward, opposed the motion. Mr. Hayward was prepared to carry out the agreement entered into with Mrs. Hayward by her counsel, and he had a right to refuse payment of her costs until steps had been taken on her part to carry it out.

Dr. Waddilove, in reply, said that the reason which Mrs. Hayward assigned for refusing to be bound by the agreement was, that when she gave her assent to it she did not understand its meaning.

Cur. adv. vult.

January 11.—CRESSWELL, J.O.: As the case now stands I think I am bound to allow the costs to be taxed up to the time when the case came on for hearing and the compromise was made. What I shall do with the costs incurred subsequent to that time is a different question. The case might then have been disposed of at a very small expense, and I do not know that I ought to charge the additional costs upon the husband.

Order for the taxation of costs up to the date of the compromise.

(Before Sir Cresswell Cresswell.)

Boston *v.* Fox.

Proof in Solemn Form.—Costs.—Executor of Previous Will.

An executor of a former will has the same right as a next of kin to put an executor of a latter will upon proof in solemn form, and to interrogate his witnesses.

This was a business of proving in solemn form the will of the late Mrs. Lucy Braham. The will was propounded by the plaintiff as executor, and the defendant who called for proof in solemn form was the executor of a previous will. The testatrix was a markswoman, and duly executed a will on the 8th Nov., 1857. The will of which the defendant was executor, was executed in 1849.

The attesting witnesses were examined and cross-examined, but no opposition was made to the grant of probate.

H. James for the plaintiff.

D. Keane, for the defendant, said, that he had waited for six months after the death of the testatrix, and then no other will being propounded, he had produced the will of 1849. The plaintiff then propounded the will of 1857, and the defendant had a right, under the circumstances, to call upon him to prove it.

Sir C. Cresswell: I rather think that the privilege of a next of kin of putting an executor to proof in solemn form is not extended to the executor of a previous will.

D. Keane referred to Coote's Probate Practice, 207 *gg.* "By the practice of the Prerogative Courts, next of kin, an executor of a former will, and a creditor or other person in possession of administration, were permitted, *before probate had been granted in common form*, to put an executor on proof of a will without being liable for costs, provided they did not do

PROBATE. JAN. 13, 1860.

BOSTON v. FOX.

so vexatiously, or did not plead or attempt to set up in the interrogatories, a case of fraud or conspiracy which the evidence did not justify them in doing." The authority cited for this proposition as to executors of former wills, was *Mansfield* v. *Shaw*, 3 Phill. 22. Sir John Nicholl, in that case, said: "The law gave him" (the executor under a former will), "the right to call upon the executor to propound his will in solemn form of law, and to interrogate the witnesses."

SIR C. CRESSWELL: That is certainly a dictum that an executor, under a former will, has a right to call for proof in solemn form, of a subsequent will. I therefore decree probate without costs.

Probate without costs.

DIVORCE AND MATRIMONIAL. JAN. 17, 1860.

JONES v. JONES.

BEFORE THE FULL COURT—CRESSWELL, J.O., CHANNELL, B., AND KEATING, J.

JONES *v.* JONES.

Adultery and Cruelty.—Evidence by wife of Cruelty, also tending to establish adultery,—22 & 23 *Vict. c.* 61, *s.* 6.

A wife was allowed to give evidence of cruelty in support of her petition for a decree of dissolution, although the same evidence tended to prove adultery.

In the absence of evidence that a husband who had infected his wife with a venereal disease, had done so wilfully or recklessly, the Court refused to treat that infection as an act of cruelty.

Matilda Jones prayed for a dissolution of her marriage with Benjamin Jones, on the ground of adultery, coupled with cruelty. The respondent did not appear.

The cruelty charged against the respondent was, that he had in May, 1857, wilfully infected the petitioner with gonorrhœa.

The respondent was a sailor, and married the petitioner in September, 1850. They cohabited when he was on shore, at Barking, until 1857. On 4th May of that year, he returned

from Grimsby, where he had been absent on a fishing expedition for six weeks. A few days after his return the petitioner became ill and consulted a surgeon. On discovering what was the matter with her, she separated from her husband. The respondent also consulted a surgeon after his return, and said to him that he must have caught the complaint at Grimsby when he was drunk. But the disease for which, as the surgeon said, he had treated the respondent, was syphilis.

Norman, for the petitioner, proposed to call her for the purpose of establishing, by means of the respondent's statements to her, that he knew that he was infected with the disease when he returned from Grimsby, and wilfully communicated it to her.

CRESSWELL, J.O.: That raises rather a difficult question upon the construction of the 22 & 23 Vict. c. 61, sec. 6. The legislature has enacted that where there is a charge of adultery and cruelty by the wife she may be a witness as to the cruelty. In a case like the present, the same evidence undoubtedly tends to prove both adultery and cruelty, and it may be said that the legislature in such a case intended to exclude the wife's evidence altogether. But their intention being left in doubt, I think the Court will best give effect to the statute by receiving the evidence of the wife as evidence of cruelty, and not acting upon it as evidence of adultery.

The petitioner was accordingly examined, and said that she was taken ill a few days after her husband's return home, and when she spoke to him on the subject after she had seen the surgeon, he told her that he had been taking medicine for six weeks down at Grimsby.

A surgeon who had been examined was recalled by their Lordships, and stated that the disease was one which might be communicated by a person who supposed that he was cured.

Norman referred to Dr. Lushington's judgment in *Ciocci* v. *Ciocci*, (1 Spinks Ec. & Ad. 131, and 18 Jurist 194), in support of his argument, that the facts established in evidence amounted to cruelty.

CRESSWELL, J.O.: We are all satisfied that you have not established a case of cruelty. The alleged act of cruelty is the

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communication of a disease of a peculiar character, and it is said there are grounds which should induce the Court to believe that the respondent communicated that disease to the petitioner wilfully, or at all events, that he knew that he was in a condition which made it probable that he would communicate it (as in the case of *Ciocci* v. *Ciocci*), and that he was perfectly reckless whether he communicated it or not. I subscribe to every word that has been read of Dr. Lushington's judgment in that case. But what is the evidence now before us? The only man who saw the husband, and could speak positively as to his state of health, the surgeon, says he was suffering from syphilis, and the disorder communicated to the wife is one of a totally different character. So much for the medical evidence as to his condition. The evidence as to her condition is such that it would be very dangerous to act on it. It rests simply on her statement of her symptoms to a medical man, for which there might or there might not be a foundation. But assuming that the disorder described by her medical man was communicated to her by the husband, what evidence is there to raise a suspicion or a surmise that he knew he should communicate it? He had consulted a surgeon four or five weeks, or it might be more, before any complaint was made by the wife. After his return from his fishing excursion she found she was ill and remonstrated with him. What was his answer? "I was taking medicine at Grimsby every time I went on shore." I should think a statement of that kind did not mean—— "I perfectly well knew that I should communicate the disease, because I had been under the doctor's care," but—"I had been under the doctor's care so long that I thought I was cured." Nothing is more probable than that he communicated the disease without knowing it. The adultery having been established, the Court will pronounce for a judicial separation, not for a dissolution of marriage.

Channell, B., and *Keating, J.*, concurred.

Judicial separation decreed.

(Before Sir Cresswell Cresswell.)

PROBATE.
APRIL 6, 1859.

In the matter of COLONEL GORDON, of Cluny.

In the Matter of Colonel Gordon, of Cluny, deceased.

Confirmation and Probate Act.

A confirmation containing the whole personal estate in Scotland of a Scotch testator, was granted before the day on which the Act came into operation, and an additional confirmation was obtained after that date, containing personal estate in England, but no further personal estate in Scotland than had been included in the first confirmation,—

Held, that the 12th Section of the Act did not apply, and the Court refused to affix its seal to the additional confirmation.

The Probate Court acts in such cases, not merely ministerially, but forms its opinion judicially as to whether the Act is applicable, notwithstanding that the Commissary Court should have granted the confirmation on the footing of its applicability.

Colonel John Gordon, of Cluny Castle, Aberdeen, died in Edinburgh on the 16th July, 1858, and his executors, on the 12th October, 1858, obtained from the Commissary Court of Edinburgh confirmation of his will, having previously given up an inventory of his personal estate in Scotland, amounting to £251,598 15*s.* 4*d.*, which inventory was duly recorded in the Commissary Court books on the 7th October, 1858.

The Confirmation and Probate Act, 21 & 22 Vict. c. 56, came into operation on the 12th November, 1858, and afterwards on the 27th December, 1858, the Commissary pronounced an interlocutor or order on a petition presented by the executors, by which he found that Colonel Gordon "died domiciled in Scotland, and that it was competent to include in the inventory of his personal estate and effects to be given up and recorded in this Court, any personal estate or effects of the deceased situated in England, or in Ireland, or in both."

The executors accordingly on the 25th January, 1859, gave in to the Commissary Court an additional inventory of Colonel Gordon's personal estate, which consisted of a sum of £4210 1*s.* 2*d.* Consols, and £7759 6*s.* New Three per Cents. The inventory contained also the amount of the original inventory of £251,598 15*s.* 4*d.*, being personal estate in Scot-

PROBATE. APRIL 6, 1859.

In the matter of COLONEL GORDON, of Cluny.

land, but there was no other personal estate in Scotland. On the 27th January the Commissary Court granted to the executors an "eik," or additional confirmation, and they applied to the Registrar of the Court of Probate that the seal of the Court should be affixed to this last confirmation in terms of the 12th Sect. of the Act. The Registrar declined to affix the seal, on the ground that the Act did not apply to the original confirmation, and that the additional confirmation applied only to personal estate in England, and was not therefore within the Act.

Anderson, Q.C., now moved the Court on behalf of the executors to order the seal to be affixed to the confirmation, and contended that the confirmation was a confirmation within the meaning of the 12th Sect. of the Act, inasmuch as it of new ratified and confirmed the appointment of the executors, and the inventory annexed included by reference to the original inventory estate in Scotland as well as in England; and further that the proper Court to determine this question was the Commissary Court of Edinburgh, which had issued the confirmation as authorized by the Act; that this Court ought therefore to give effect to the proceedings in the Commissary Court; its functions under the statute in affixing the seal being ministerial rather than judicial.

April 13th, 1859.—SIR C. CRESSWELL: In this case I remain of the opinion I entertained when the motion was made, that I cannot order the seal of this Court to be affixed to this instrument. The question depends on the 12th Sect. of the Confirmation and Probate Act, which is in the following terms:—"From and after the date aforesaid when any confirmation of the executor of a person who shall in manner aforesaid be found to have died domiciled in Scotland, which includes, besides the personal estate situated in *Scotland*, also personal estate situated in *England*, shall be produced in the principal court of probate in *England*, and a copy thereof deposited with the Registrar, together with a certified copy of the Interlocutor of the Commissary finding that such deceased person died domiciled in *Scotland;* such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and

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effect in *England* as if a Probate or Letters of Administration, as the case may be, had been granted by the said Court of Probate." This alteration in the law, introduced by the Act, was to take effect from and after the 12th November, 1858, and of course the confirmation previously granted is not within its operation. The additional confirmation does not appear to me to come within the terms of the Act, because it does not include besides the personal estate in Scotland personal estate in England. All the Scotch personal estate had been previously confirmed by the original confirmation. The Act cannot have a retrospective operation. It has been said that I ought to act ministerially; but I must exercise my opinion whether the case comes within the Act or not; and having formed an opinion that it does not, I cannot order the Registrar to affix the seal of the Court. I shall do so if the Court of Queen's Bench direct me by a *mandamus*, which I shall be pleased if the executors apply for.

Anderson: I will rather withdraw the motion, and take probate of the will in common form.

(BEFORE THE FULL COURT:—CRESSWELL, J.O.; CHANNELL, B., AND KEATING, J.)

DIVORCE AND MATRIMONIAL. JAN. 18, 1860.

BANNISTER *v.* BANNISTER and DAVIS.

BANNISTER *v.* BANNISTER AND DAVIS.

Petition for Dissolution.—Hearing Adjourned—Amendment after Adjournment.

The hearing of a petition by a husband for a dissolution having been adjourned, in order that a missing witness might be produced, an application was made, before the hearing was resumed, for leave to amend the petition by the insertion of allegations of adultery committed three years previous to the date of the adultery originally charged. The Court refused the application.

This was a petition by Benjamin Bannister for a dissolution of his marriage on the ground of his wife's adultery. The respondent, in her answer, denied the adultery charged, and recriminated.

DIVORCE AND MATRIMONIAL. JAN. 18, 1860.

BANNISTER *v.* BANNISTER and DAVIS.

The cause came on for hearing before the full Court (CRESSWELL, J.O., WIGHTMAN, J., and BYLES, J.) on the 16th Nov., 1859. *Dr. Phillimore*, Q.C., and *Macqueen* for the petitioner, called witnesses who proved the marriage in 1839, and cohabitation at Birmingham until 1847. The adultery charged in the petition was subsequent to the separation in that year. The petitioner formerly kept a public-house called the Brown Lion. One of the witnesses was Emma Smith, a married daughter of the petitioner, and on cross-examination by *E. Ward* (for the respondent), she said that after the separation, her father went to a public-house called the Angel; that the name of a woman, Louisa Harrison, was over the door; that her father was master, and Harrison was mistress of the house, and that he lived there until 1850.

One of the witnesses called by the petitioner did not answer, and was called upon her subpœna. It was stated that she was a material witness in support of the allegations of adultery, and the hearing was adjourned to give the petitioner an opportunity of producing her.

Macqueen now moved for leave to amend the petition by the insertion of allegations of adultery in 1846. The motion was founded upon an affidavit of the attorney for the petitioner, to the effect that since the hearing, two of the witnesses had communicated to him that they had witnessed acts of adultery committed by the respondent in that year. In the event of the application not being granted, he should ask their Lordships to dismiss the petition.

CRESSWELL, J.O.: We are of opinion that we cannot grant your application to amend the petition. It is made under very peculiar circumstances. The petition charged adultery by the wife on certain occasions; she recriminated, and as the case stood on the cross-examination of one of the daughters of the petitioner, the evidence of adultery by the husband was much stronger than that of adultery by the wife. That being the state of affairs, a witness was called by the petitioner, who did not answer, and she was called on her subpœna. The case was allowed to stand over in order to give the petitioner an opportunity of forcing that witness to appear, she having apparently absconded. It is remarkable that the attorney, on

whose affidavit this application is founded, does not state that before the hearing he had taken her evidence himself, but that he was instructed to put certain facts into the briefs. However, the production of this witness being the purpose for which the case was allowed to stand over, it is now sought to amend the petition by the introduction of an entirely new charge, by the allegation of transactions which are supposed to have taken place five or six years before the transactions on which the petition as it now stands is founded. And the evidence by which this new charge is to be supported, is of a most remarkable character. Two women looking through a window see a man, whose name they do not know, committing adultery with the respondent. It would be monstrous to allow that charge now to be introduced into the petition. The attorney must have known something about this evidence before the case came on, because he wished at the hearing to have the fact proved that he now wishes to allege, but was not allowed to prove it as it was not in the petition.

There was strong evidence in support of the wife's plea of recrimination. The daughter said that her father had lived for three years in a public-house kept by a woman named Harrison, and that they lived together as man and wife.

In the Ecclesiastical Courts, where a party, suing for a divorce, failed in establishing his case, the party cited was dismissed from the suit. In this case, the wife having been cited, and no case having been established against her, or rather her plea of recrimination if anything having been established, she must be dismissed from the suit.

E. Ward applied for the costs of the motion as well as of the suit.

CRESSWELL, J.O.: You need not have appeared to-day.

E. Ward: We had notice of the motion.

CRESSWELL, J.O.: Then you are entitled to your costs.

The respondent was dismissed from the suit.

PROBATE.
DEC. 7 and 21.

In the Goods of THOMAS PARR, Deceased.

(BEFORE SIR CRESSWELL CRESSWELL.)

In the Goods of THOMAS PARR, deceased.

Erasure.—Substitution of Executors.

After a will had been duly executed, the names of two of the executors were erased by the direction of the testator, and two other names were substituted. The testator, in the presence of one witness, signed his name in the margin by the alterations. The Court held that in the probate the names of the executors which had been erased must be restored.

Thomas Parr, late of Runcorn, in the County of Chester, died on the 18th June, 1859, having made and duly executed a will on the 2nd Oct., 1857, of which William Francis Salkeld, James Stockdale, and William Brundrit were appointed executors. In June, 1858, the deceased directed William Howard to strike out the names of two of the executors, W. F. Salkeld, and J. Stockdale, and substitute the names of two other persons, William Howard and Thomas Duckworth. W. Howard, in the presence of the testator, wrote the names of the executors who were to be substituted for those originally appointed in the margin of the will, and afterwards erased the original names so as to render them illegible. He then wrote the names of William Howard instead of James Stockdale, and Thomas Duckworth instead of William Brundrit, and the testator signed his name in the margin by the erasures in the presence of W. Howard.

Dr. Spinks moved for a grant of probate to William Francis Salkeld, with a reservation of power to James Stockdale and William Brundrit. He referred to *Brookes* v. *Kent*, 3 Moore, P. C. C. 334, and *Soar* v. *Dolman*, 3 Curt. 121.

SIR C. CRESSWELL: What evidence have you of the original state of the will?

Dr. Spinks: The affidavits of the attesting witnesses, and that of the person who made the substitution.

SIR C. CRESSWELL: As at present advised, I should think that a memorandum of the testator as to what was the state of the will before the erasure, would not be evidence of the fact, although it might be good evidence of his intention in making the alteration.

Cur. adv. vult.

Dec. 21.—SIR C. CRESSWELL: I have given directions to the Registrar to issue probate restoring the original names of the executors. I have looked into the cases, and I find that the decision of the Privy Council has been followed. It requires some nicety to distinguish between the cases where perfect erasure is to be fatal, and those where it may be treated as an erasure for the purpose of substitution. I should have had greater difficulty in applying the authorities to this case if a pecuniary interest had been involved, instead of a mere appointment of executors.

Probate granted with the names of the original executors.

(BEFORE THE FULL COURT:—CRESSWELL, J.O.; CHANNELL, B., AND KEATING, J.)

PLUMER *v.* PLUMER and BYGRAVE.

Dissolution of Marriage.—Evidence of recriminatory charges not pleaded.—Amendment of Answer.—Costs.

A co-respondent whose answer merely traversed the allegation of adultery, was not allowed to cross-examine the witnesses called to establish that allegation, for the purpose of eliciting that the petitioner had been guilty of adultery, or of such misconduct as would induce the Court to exercise its discretion by withholding a decree; but upon a statement being made that the co-respondent would probably be able to establish a case of such misconduct on the part of the petitioner if he had the opportunity, the Court allowed him to amend his answer by the insertion of various counter charges against the petitioner, and reserved the question of the costs of the day until the merits of the case had been ascertained.

DIVORCE AND MATRIMONIAL. JAN. 21, 1859.

PLUMER v. PLUMER and BYGRAVE.

Evidence tendered by a co-respondent of declarations by the wife to a third person, when the husband was not present, with regard to the conduct of the husband during cohabitation, is not admissible.

The petitioner, William Plumer, prayed for a dissolution of his marriage with Louisa Plumer, on the ground of her adultery with Henry Bygrave. The respondent did not appear. The co-respondent appeared and pleaded a denial of the adultery.

Patchett, for the petitioner, called witnesses, who proved the marriage in 1838 and cohabitation until 1851.

D. Keane, for the co-respondent, asked one of these witnesses, the respondent's brother, whether the respondent had ever complained to him of the petitioner's cruelty to her.

CRESSWELL, J.O.: Your answer only traverses the adultery charged in the petition. You do not charge cruelty. And how can you make her declarations evidence against the petitioner?

D. Keane submitted that he was entitled to put questions for the purpose of eliciting that the petitioner had been guilty of misconduct, such as adultery, cruelty, or unreasonable delay, which would induce the Court to exercise its discretion by refusing a decree, notwithstanding the adultery of the respondent. If a decree were made, the co-respondent might be condemned in costs, and he therefore had a right to establish facts which would induce the Court to withhold a decree. Upon the question of his right to give evidence of the respondent's statements to the witness with regard to the conduct of the petitioner, he referred to *Winter* v. *Wroot* (1 Moody and Robinson, 404), cited in Roscoe's N. P. 563. That was an action for crim. con., in which counsel for the defendant, in cross-examination, asked a witness for the plaintiff who had been called to prove the terms on which the parties lived together before the alleged criminal intercourse, whether he had ever heard the plaintiff's wife complain of the plaintiff's treatment of her. An objection to this question being made by counsel for the plaintiff, the learned Judge, Lord Lyndhurst, said: "I think the complaints of the wife are evidence as showing the terms upon which the parties lived together. That is made up of a number of acts of the two parties, of which the com-

plaints form part. I think, therefore, the witness may be asked generally whether the wife made complaints of the manner in which her husband treated her." Also *Trelawny* v. *Coleman*, 2 Starkie, N. P. C. 191.

CRESSWELL, J.O.: In *Winter* v. *Wroot*, the witness, in his examination in chief, said, that the parties had lived harmoniously together. In cross-examination, he was asked whether he had ever heard the wife complain of the husband's conduct. That question was put for the purpose of ascertaining the weight to be given to the statement in the examination in chief; for if he had heard such a complaint, it would have detracted from the value of his evidence as to their having lived together harmoniously. If the ruling cannot be justified on that ground, I cannot but say that I dissent from it.

The question was accordingly withdrawn.

D. Keane then put some questions with the view of eliciting the fact that the petitioner had been guilty of adultery, and referred to a MS. note of *Tollemache* v. *Tollemache* (*a*).

(*a*) In *Tollemache* v. *Tollemache* (tried before WIGHTMAN, J., WILLIAMS, J., and CRESSWELL, J.O., on the 8th July, 1859), the petitioner, a husband, alleged that he was, and had been since his birth, domiciled in England; that he was married to the respondent in Scotland, and afterwards in England; that in 1841 she committed adultery at Glasgow, and that the Scotch Court pronounced a sentence of divorce in consequence of that adultery; and he prayed for a dissolution of his marriage. The respondent, in her answer, traversed the allegation that the petitioner had always retained an English domicil, and alleged that he had acquired a Scotch domicil before the marriage, and retained it until after the Scotch decree of divorce. Issue was joined before a special jury on the question of domicil only. The respondent examined witnesses in support of her allegation, the petitioner examined witnesses in opposition to it, and the jury returned a verdict for the petitioner.

On the 9th July, 1859 (before WILLIAMS, J., MARTIN, B., and CRESSWELL, J.O.), the Queen's Advocate (*Sir J. Harding*) and *Mundell*, for the petitioner, proceeded to examine witnesses to prove those allegations in the petition which had not been traversed by the respondent.

Dr. Deane, Q.C. (with him *J. A. Russell* and *Kinnear*), for the respondent, objected to one of the questions put to the first of these witnesses in his examination in chief.

CRESSWELL, J.O.: What is your *locus standi?*

Dr. Deane: We have appeared and pleaded, and therefore we do not come within the rule that where a respondent has not appeared and answered, her counsel cannot cross-examine the petitioner's witnesses.

DIVORCE AND MATRIMONIAL. JAN. 21, 1859.

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CRESSWELL, J.O.: The Court no doubt has jurisdiction to enter into an inquiry whether there are any circumstances which should induce it to refuse a decree; but my impression is, that you have no right to enter into such an inquiry. You would be taking a great advantage of the other side by eliciting evidence of matters which you have not pleaded, and of which they have had no notice.

D. Keane: A petitioner should be prepared to stand the test of an inquiry into all these matters without notice.

CRESSWELL, J.O.: Do you apprehend that you have a right to dispute facts which, as far as your client is concerned, are admitted on the record?

Dr. Deane: We have a right to cross-examine.

CRESSWELL, J.O.: If, when the allegations in a petition are uncontradicted on the record, the respondent can controvert them at the hearing, he must have a right to call witnesses as well as to cross-examine.

WILLIAMS, J.: We are of opinion that it is not competent to Dr. Deane to cross-examine the petitioner's witnesses, or in any way to dispute the facts which his client has admitted on the record.

After evidence had been given of the allegations in the petition, a witness was called to explain the delay that had taken place, since the adultery was committed, in the institution of proceedings for a divorce in England.

WILLIAMS, J.: It is competent to Dr. Deane to raise a question as to the propriety of a decree being granted by the Court, but he must assume that the case of the petitioner has been made out to the satisfaction of the Court—that is to say, that the facts which are not denied on the record have been proved. He may therefore put questions to this witness, and address the Court.

At the conclusion of the witness's examination,

WILLIAMS, J., said—We think the petitioner should be called for the purpose of being examined by Dr. Deane.

Dr. Deane said he did not wish to examine him. He then addressed the Court upon the questions of unreasonable delay and of the effect of the Scotch divorce.

The Court finally dissolved the marriage.

And in *Parker* v. *Parker and McLeod*, tried on the 9th July, 1859, before WILLIAMS, J., MARTIN, B., and CRESSWELL, J.O., the petitioner prayed for a decree of dissolution on the ground of his wife's adultery. The respondent did not traverse the adultery, but pleaded connivance. Issue was joined on this plea by the petitioner. The respondent began and examined witnesses in support of the plea, but the jury found that it had not been established.

Pigott, Serjt., and *Dr. Spinks*, for the petitioner, then called witnesses in support of the allegations in the petition which had not been traversed.

Dr. Swabey for the respondent.

By the Court: Dr. Swabey is precluded from interfering with regard to those matters which have not been traversed on the record; but he will be allowed to interfere with regard to any matters which go to the discretion of the Court as to withholding a decree.

The marriage was dissolved.

See *Bacon* v. *Bacon*, ante, 68.

CRESSWELL, J.O.: A petitioner should be prepared to prove all that is necessary to entitle him to a decree. But he cannot come prepared to disprove the statements of his own witnesses. By traversing adultery on the record, and not pleading anything else, you lead him to believe that adultery is the only question you will raise.

After conferring with the other learned Judges,

CRESSWELL, J.O., said: I do not think it would be at all a proper course to allow any of the parties to the record as a matter of right to cross-examine the petitioner's witnesses in the manner you propose when the pleadings are in this state. The Court may examine any witnesses brought before it to elicit information which may guide it in the exercise of its discretion, and it cannot be precluded from entering into any inquiry by the pleadings which the parties may have thought fit to put on the record. In many cases, facts have been elicited by the Court which not only justified it in refusing, but made it incumbent on it to refuse a decree, although both parties were anxious to obtain it. In one remarkable case, although there was no plea of collusion, facts were elicited which established collusion, and the petition was dismissed, to the great mortification no doubt of the three parties to the suit (*a*). But it would be very improper to allow a party to the suit, who had simply pleaded a denial of one of the facts alleged in the petition, and had thereby given notice to the petitioner that that fact only would be contested, to spring a mine upon the petitioner at the hearing, by eliciting evidence of some counter-charge which the petitioner might perhaps have been prepared to meet if he had had notice of it. At the same time, when it is intimated to the Court that there are facts in a case which ought to be brought before it, and that they can be proved by one of the parties if an opportunity is afforded him, the Court is very reluctant to proceed and determine the case in the dark. We therefore think the co-respondent ought now to be allowed to plead the facts which he thinks he has the means of proving.

D. Keane said, the co-respondent had been managing his

(*a*) *Lloyd* v. *Lloyd and Chichester*, ante, 39.

DIVORCE AND MATRIMONIAL. JAN. 21, 1859.

PLUMER v. PLUMER and BYGRAVE.

own case, and it was not until two or three days ago that the papers were handed to his attorney.

Patchett applied for the costs of the day.

D. Keane: The question of the costs of the day should be reserved until the whole case is before the Court.

CRESSWELL, J.O.: These cases are not like ordinary *nisi prius* causes. It is for the interest of public morality that the Court should not proceed to a decree when there appear to be circumstances which ought to be inquired into. I can see no injustice in allowing the answer to be amended, and in making the costs depend upon the merits of the parties.

Leave was accordingly given to the co-respondent to add to his answer charges of adultery, cruelty, connivance, and condonation against the petitioner, the amendment to be made within a week; and the question of costs was reserved.

PROBATE. JAN. 18, 1860.

In the Goods of DAVID DAVIS.

(BEFORE SIR CRESSWELL CRESSWELL.)

In the Goods of DAVID DAVIS, deceased.

Administration with the will annexed.—Intermeddling with the estate by administrator.

An administrator with the will annexed cannot be forced to take out administration with a later will annexed when the first administration is revoked, although he has intermeddled with the estate.

David Davis, died on the 26th April, 1854, and administration with the will annexed was granted to Eleanor Morgan. The will was dated June, 1841, but after that grant a later will was discovered, dated July, 1849. The administratrix had been cited to bring in the letters of administration of the will of 1841 from the Caermarthen registry, and she had done so, but she refused to take out administration with the will of 1849 annexed.

Dr. Spinks, at the instance of two devisees under the will of 1849, moved for a citation calling on her to take out administration with that will annexed, on the ground that she had intermeddled with the estate.

SIR C. CRESSWELL: There are two difficulties in your way. Your clients are merely devisees of real estate; they have no interest in the personal estate.

The other difficulty is, that there is no instance to be found in which an administrator has been compelled to take a grant. An executor who has intermeddled can be compelled to take probate, but an administrator who has intermeddled cannot be compelled to take a grant.

Motion refused.

(BEFORE THE FULL COURT—CRESSWELL, J.O., BRAMWELL, B., and BYLES, J.)

ALEXANDER *v.* ALEXANDER and AMOS.

Petition for Dissolution.—Adjourned Hearing.—Leave to the Respondent to Answer after Adjournment.

At the hearing of a petition by a husband for a decree of dissolution on the ground of his wife's adultery, it was stated by one of the witnesses called on the part of the petitioner, that the respondent, who had not appeared, had a good answer to the charge, but had been prevented from bringing it before the Court by the threats of the petitioner. The Court not being satisfied with the proof of adultery, adjourned the hearing for further evidence. Before the case again came on for hearing, an application was made on the part of the respondent to be allowed to answer, and it was supported by an affidavit explaining that she had omitted to do so at the proper time, in consequence of having been threatened by the petitioner's attorney, that if the petitioner did not obtain a divorce he would go abroad and leave her destitute. The Court granted an order *nisi* to allow her to answer, and no cause being shown on the part of the petitioner, it was afterwards made absolute.

This was a petition by a husband for a decree of dissolution, on the ground of his wife's adultery. The petitioner alleged marriage in 1838, cohabitation until 1858, and the birth of four

DIVORCE AND MATRIMONIAL. Nov. 19 & 30, 1859.

ALEXANDER v. ALEXANDER and AMOS.

children, and adultery with a man in the petitioner's service in 1858, at Jersey.

The marriage and cohabitation having been proved, two witnesses were called who had been servants in the employment of the petitioner at Jersey, and who gave direct evidence of adultery in the house of the petitioner at Jersey, between Mrs. Alexander and Amos, who was a groom in Mr. Alexander's service.

Mrs. Lockwood, the sister of the respondent, was also called to prove that Mrs. Alexander was then living at Ipswich. After she had been examined, Mrs. Lockwood stated to the Court that Mrs. Alexander had not appeared to the citation, in consequence of having been threatened that if she did, Mr. Alexander would quit the country and never see her again, and leave her destitute. She added, that if she were allowed time, she would be able to make a good defence.

CRESSWELL, J.O.: We are not prepared upon the evidence as it stands to pronounce a decree of dissolution. We shall, therefore, exercise the authority conferred on us by the 44th sec. of the Act, and adjourn the hearing for further evidence.

An application has been made somewhat irregularly, but the Court could not fail to take notice of it, to allow Mrs. Alexander an opportunity of defending herself. It is unfortunate that she has not before been advised that she had a right to appear if she pleased. I should have thought that most legal practitioners knew that a husband could be called upon to pay the costs incurred by his wife in defending herself against a charge of adultery. The Court will be prepared to deal with any application which may be made on the part of the wife.

(BEFORE CRESSWELL, J.O.)

November 30.—*Couch* moved for an order to allow the respondent to answer. In her affidavit in support of the application Mrs. Alexander stated that in September, 1858, she came with her husband and her son from Jersey to London, for the purpose of consulting Dr. Ferguson on the state of her health; that Dr. Ferguson not being in town, it was arranged that she should go down to Ipswich for a short time on a visit to her

mother; that on the 10th September she accordingly proceeded to Ipswich, and parted with her husband on good terms; that a week after her arrival a brother of her husband, a banker at Ipswich, applied to her to sign a deed of separation; that she declined, but that the same application was frequently renewed by a solicitor at Ipswich employed by her husband; that a deed of separation was produced to her, but she would not sign it; that Mr. Alexander at first remitted money to her by post office order, but soon ceased to do so, and then his brother paid her an allowance of £2 a fortnight; that on the 4th February the solicitor employed by Mr. Alexander at Ipswich served her with the citation and petition; that after reading over the petition she informed him that the statements it contained were utterly untrue, and asked his advice as to how she should act; that he said that if she appeared she would lose her allowance and be left penniless; that she told him she had no money, but was anxious to vindicate herself from the charge; that he said that if her husband did not succeed in getting a divorce he would go abroad with all his children, and she would be obliged to go to the workhouse; and that she being intimidated by these statements, and not knowing what to do, did not appear to the citation. Mrs. Alexander further denied the charges in the petition. She had entered an appearance since the hearing, and now asked permission to put in an answer.

CRESSWELL, J.O.: You may take an order calling on the other side to show cause why that should not be done.

Order *nisi* accordingly.

December 14.—No cause being shown, the order was made absolute on motion by Cresswell, J.O.

An answer was accordingly filed by Mrs. Alexander, and the cause was directed to be tried by oral evidence before the full Court in the usual course.

DIVORCE AND MATRIMONIAL. JAN. 25, 1860.

HOOPER *v.* HOOPER.

(BEFORE CRESSWELL, J.O.)

HOOPER *v.* HOOPER.

Judicial Separation.—Compromise by Counsel with the assent of Clients.

At the hearing of a petition by a wife for a judicial separation on the ground of cruelty, the Counsel on both sides, with the assent of their respective clients, agreed that the suit should not be further moved, upon a certain amount of alimony being paid by the respondent upon a deed of separation being executed, and upon the question of the income being referred to arbitration. The petitioner proposed to enter into the question of cruelty or no cruelty before the referee, and to have her costs paid by the respondent as between attorney and client. Upon the refusal of the respondent to enter into the question of cruelty, and of the referee to entertain it, the petitioner applied to have the cause again set down for hearing. The Court held, that it was not the meaning of the compromise that the referee was to consider the question of cruelty, that the petitioner was bound by the compromise, and that the case ought not therefore to be set down for hearing.

This was a petition by a wife for a judicial separation, on the ground of cruelty. The respondent pleaded a denial of the charge. The cause came on for trial on the 16th of June, 1859, before CRESSWELL, J.O., and a special jury. Before the jury were sworn the leading counsel on each side agreed to a compromise, and the jury were discharged. The compromise was in the following terms: "Record withdrawn. Proceedings to be stayed, and the suit not moved; Mr. Hooper paying the present alimony ordered by the Court *pendente lite* of £250 a year, and agreeing to add thereto £50 a year; Mr. Brabant to be requested to settle the terms of the separation by deed, with full power over the question of income.

(Signed) *K. Macaulay,*
Montague Smith."

November, 16.—*Macqueen* moved that the record might be re-entered. Mrs. Hooper's attorney had no security for his costs.

Montague Smith, Q.C., for Mr. Hooper, said that a sum of

money had been deposited in the Registry as security for costs.

The following order was made:—"The money in Court to be retained for the satisfaction of such costs as may be awarded to Mrs. Hooper, Mr. Brabant to settle a deed on or before the 20th of Dec.; the Court to have power to enlarge the time."

January 25.—*J. Wilde*, Q.C. (*Watkin Williams* with him), moved on behalf of Mrs. Hooper, for leave to re-enter the record, and to have the cause set down for hearing. He read affidavits, from which it appeared that the attorney for Mrs. Hooper proposed to enter into the question of cruelty or no cruelty before Mr. Brabant; that an objection was raised on the part of Mr. Hooper to that question being discussed; and that Mr. Brabant declined to undertake the reference if it involved a contest, and a decision upon that question. He referred to *Hayward* v. *Hayward*, 1 Sw. & Tr. 333, to show Mrs. Hooper's right to have her petition heard (*a*).

CRESSWELL, J.O.: In that case the bargain was made between the parties in private, and the petition remained upon the books of the Court. It was unheard, and simply adjourned. Here the petition remains on the books of the Court, but it is subject to an agreement between the parties that it shall not be proceeded with any further.

Montague Smith, Q.C., for the respondent, opposed the motion. When the attorney for the respondent made a proposal for a settlement, a counter-proposal was made by the attorney for the petitioner, that Mr. Brabant should enter into the question of cruelty, and that Mrs. Hooper's costs should be paid as between attorney and client. Both these proposals were contrary to the plain meaning of the agreement entered into by Mrs. Hooper's counsel after a personal interview with her; and Mrs. Hooper ought not to be allowed to throw upon the respondent the expense of a trial because she did not now choose to be bound by the agreement.

(*a*) See *Hayward* v. *Hayward*, ante, p. 135.

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CRESSWELL, J.O.: I am of opinion that the Court ought not to grant the application. It is of the last importance that parties who come before the Court, and, with their eyes open, undertake to pursue a particular course, who obtain the sanction of the Court to that course, and who have it confirmed by an order of the Court, should not be permitted to treat the Court with contempt by afterwards refusing to carry it into effect. It would be most mischievous for the parties to a suit, acting under the advice of able counsel, to make an arrangement at the hearing of a cause, and afterwards, probably in consequence of meeting with some other advisers who tell them they might have made a better bargain, to be allowed to shuffle out of their agreement. On reading the papers in the case, I can see that an anxious attempt has been made, on the part of the petitioner, to bring before Mr. Brabant matters which were never intended to be submitted to him. The petitioner undertook to stay the suit. The suit was not referred to Mr. Brabant. There were no terms, that all matters in issue should be referred, or anything of the kind. Nor was there anything like a stipulation, that the costs should be paid by Mr. Hooper as between attorney and client. I think, therefore—the meaning of the terms to which the lady consented being, that the suit should be no further prosecuted, and the lady not having shown that the respondent has attempted to deprive her of the benefit of any of the terms to which he agreed—that I ought not now to order the case to be again set down for hearing. There is an appeal given by the statute against my present decision, otherwise I might have taken time to deliberate, for the point is an important one. I shall be very glad to have it finally settled by a superior Court, in order that I may know hereafter whether an arrangement entered into deliberately at the trial of a cause, by a wife, is afterwards to be treated as a nullity, and all the expenses of the postponement to be thrown upon the unfortunate husband.

Dr. Phillimore, Q.C.: I was the leading counsel for Mrs. Hayward, in *Hayward* v. *Hayward*, and I made the arrangement on her part. As the arrangement was not carried out, I did not think it right to go on with the case. But in that case your Lordship, on my application, allowed the petition to stand over, instead of striking it out of the books.

CRESSWELL, J.O.: *Hayward* v. *Hayward* was merely postponed, and there was no agreement that it should not be prosecuted. That is the distinction between *Hayward* v. *Hayward* and this case. You were very ill used in *Hayward* v. *Hayward*. Any counsel whose client gives him authority to enter into an agreement, and afterwards refuses to act upon it, is very ill used.

Motion rejected.

(BEFORE SIR CRESSWELL CRESSWELL.)

ROBINS and PAXTON *v.* DOLPHIN.

Costs of Opposition to a Will.—Doubtful Questions of Law.

In opposition to a will a question of law was raised which was decided in favour of the executors propounding the will. Upon appeal to the House of Lords, their Lordships, after hearing one argument, directed a second argument upon the case, but the decision was ultimately affirmed, without costs. The Court held that the question was so doubtful that the party opposing was entitled to have it decided by a competent tribunal, and therefore directed the costs of the litigation in this Court to be paid out of the estate.

This was a cause of proving in solemn form the last will of Mary Ann Dolphin, the wife of Vernon Dolphin. The will, dated the 11th April, 1854, was propounded by the plaintiffs as executors, in the Prerogative Court. The cause was transferred to this Court by the Probate Act. The defendant was the husband of the testatrix, and he delivered a responsive allegation, setting up a revocatory codicil, dated June, 1856. This codicil was executed by the testatrix in France, and was valid by the law of that country. The question raised by the responsive allegation was whether the testatrix, who had separated from her husband by mutual consent, who had then obtained a Scotch divorce, and who afterwards married a Frenchman in Scotland, and lived with him in France until her death, had acquired a French domicil so as to enable her to revoke an English will by the French codicil. That allegation, after having been amended by his Lordship's direction,

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was rejected. From this decision there was an appeal to the House of Lords. Their Lordships, after hearing an argument upon the question raised in this Court, directed a second argument upon the question whether a married woman could acquire a domicil separate from that of her husband by reason of the misconduct of the husband. They ultimately affirmed his Lordship's judgment and dismissed the appeal, but without costs (*a*).

Dr. Spinks (*Dr. Wambey* with him), now moved for probate of the will to the executors, and also that the defendant might be condemned in costs.

Dr. Deane, Q.C. (*Dr. Twiss*, Q.C., with him), opposed the motion as to costs. The defendant had done nothing improper in raising the question of law, which was so doubtful that their Lordships heard two arguments upon it; and the litigation had in fact been caused by the act of the testatrix in making the revocatory codicil.

SIR C. CRESSWELL: It is hardly correct to say that the testatrix by an act of hers led the defendant into an error; although in another sense the proposition is true, for no doubt if there had been no revocatory codicil there could have been no litigation.

Dr. Spinks: If the defendant ought not to be condemned in costs, he certainly ought not to have his costs out of the estate. He caused considerable unnecessary expense by bringing in an allegation, which had to be amended and was finally rejected. The original allegation ought not to have been brought in.

SIR C. CRESSWELL: The allegation was amended at my desire, in order to raise the question of law more satisfactorily. I must deal with the case as it would have been dealt with under the old practice. The registrar (Mr. Jenner) tells me that in the Prerogative Court, when probate of a will was opposed upon a difficult point of law, although that point was afterwards decided in favour of the party propounding the will, the costs of the opposition were allowed out of the estate.

(*a*) See 1 Sw. & Tr. 37, and 29 L. J. P. & M. 11.

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